EXAMINATION OF THE LEGAL FRAMEWORK AGAINST THE USE OF CHILDREN IN ARMED CONFLICT

BY

BINUGA JENNIFER NAUMA

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NASARAWA STATE UNIVERSITY, KEFFI NIGERIA

DECLARATION

I hereby declare that this dissertation has been written by me and it is a report of my research work. It has not been presented in any previous application for LLM. All quotations are indicated and sources of information specially acknowledged by means of references.

25/06/2021

BINUGA JENNIFER NAUMA DATE

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CERTIFICATION

This dissertation titled: *"Examination of the Legal Framework against the Use of Children in Armed Conflict"* by Binuga Jennifer Nauma meets the regulations governing the award of Masters of Law (LLM), of the School of Postgraduate Studies, Nasarawa State University, Keffi, and is approved for its contribution to knowledge.

Name: Dr.Halima Doma — Date: 28/04/21

Chairman, Supervisory Committee

Name: Dr. M.Y Zakari — Date: 28/04/21

Member, Supervisory Committee

Name: Dr. Halima Doma — Date: 28/04/21

Head of Department

Name: Dr. Habiba Musa — Date: 28-04-2021

Internal Examiner

Name: Prof. J.O Adedoyin-Raji — Date: 28/04/2021

Dean of Faculty

Name: Prof. Emily I. Alemika — Date: 28/04/2021

External Examiner

Name: Prof. Jonathan M. Ayuba — Date: 28-04-2021

Dean, School of Postgraduate Studies

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DEDICATION

I dedicate this work to my daughters, Nabasa, Nyamtema and Nselina. I want you to know that your dreams are valid and attainable.

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TABLE OF ABBREVIATIONS

API -	Additional Protocol to the Geneva Conventions of 12 August 1949.
APII -	Additional Protocol to the Geneva Conventions of 8 June 1977.
CRC -	The United Nations' Convention on the Rights of the Child 1989.
ECHR -	European Convention of Human Rights 1950
ECHR -	European Court of Human Rights
IAC -	International Armed Conflict
IACHR -	Inter-American Court of Human Rights
ICTR -	International Criminal Tribunal for Rwanda
ICTY -	International Criminal Tribunal for the former Yugoslavia
IHRL -	International Human rights law International armed conflict
IHL -	International Humanitarian Law
NIAC -	Non-international armed conflict
RS -	Statute of the International Criminal Court 1998
SCSL -	Special Court of Sierra Leone
UDHR -	Universal Declaration of Human Rights 1958
UN -	United Nations
UNGA -	United Nations General Assembly
UNSC -	United Nations Security Council

TABLE OF CASES

Prosecutor v. Thomas Lubanga ICC-01/04-01/06 2012

Prosecutor v. Brima, Kamara and Kanu SCSCL – 04- 16-T 2013

Prosecutor v. Fofana and Kondewa SCSCL-04-14-A 2007

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Child Rights Act

ABSTRACT

International humanitarian law provides broad protection for children. In the event of armed conflict, either international or non-international, children benefit from the general protection provided for civilians not taking part in the hostilities. Non-combatant civilians are guaranteed humane treatment and covered by the legal provisions on the conduct of hostilities. Given the particular vulnerability of children, the Geneva Conventions of 1949 and their Additional Protocols of 1977, lay down a series of rules according them special protection. The Additional Protocols, the 1989 Convention on the rights of the child and its recent Optional Protocol, in particular, also set limits on children's participation in hostilities. The United Nation's Secretary General's children and armed conflict report for 2016 formally lists seven armed forces and 56 non-state armed groups in countries including Myanmar, Somalia and Syria, who involve children in armed conflicts. Additionally, non-state armed groups, several other countries are also known to recruit and use children to participate in hostilities, although the changing nature of conflicts often makes these situations difficult to formally verify. This is alarming. Armed conflict continues to tear apart communities across the world. From Boko Haram's abducted 'brides' and Islamic State's 'Caliphate Cubs', to the countless others exploited by armed groups in Democratic Republic of Congo, South Sudan and Afghanistan, many taking part in the world's wars are still children. The researcher found that it is not necessarily so that we need new law. Rather, we need some clarification of existing law, especially as regards active participation, but more importantly we need to have the law as it stands implemented. States, civil society, the United Nations (UN), and others have highlighted the impact of armed conflict on children over the past decade, yet accountability efforts seldom result in tangible improvements to the security and well-being of children and their communities. Additionally, perpetrators are rarely held to account for their actions, emboldening them to continue committing serious violations against children with impunity. The methodology utilised for this research is the doctrinal or library-based methodology. The primary sources of materials used are the relevant statutes and case laws. It is recommended that States should include the concept of child-specific protection in peacetime training and exercises at all levels of the armed and national security forces.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The plight of child soldiers, the widespread use of landmines and small arms, and images of children lined up in refugee camps awaiting food or medical care have helped the international community appreciate the suffering faced by children during armed conflict. The protection and security of children is traditionally approached from a human rights perspective, focusing on treaties and conventions such as the United Nations Convention on the Rights of the Child. Surprisingly, it is only recently that the question of child protection has been approached from a 'security-oriented' perspective. Efforts such as Security Council resolutions 1261, 1314 and 1379 are helping to raise awareness and reframe child protection as a human security issue. Ensuring the security of children in armed conflicts and demanding new thinking and partnerships that combine the expertise and action of disarmament, human rights, humanitarian and development specialists.[1]

Children's insecurity in times of conflict manifests itself in numerous insidious ways. At present, it is estimated that there are 30 million children who have been displaced by war within and outside their countries.[2] Children are increasingly targeted, abducted and, in many cases, recruited as combatants and trained to operate small arms and light weapons. The impact of war on girls is particularly damaging, as they are sometimes abducted and are sexually abuse and enslaved during armed conflict. There is undoubtedly a correlation between the easy availability of small arms and the dramatic rise in the victimization of children. Recent developments in warfare have significantly heightened the dangers for children. During the last

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[1]Olara A. Otunnu Under-Secretary-General Special Representative of the Secretary-General for Children and Armed Conflict)Special Comments (2002)(*Children and Security Journal Vol. 3*)

[2]UNICEF Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2017) <www.unicef.org> *accessed on 7/03/19*

decade, it is estimated (and these figures, while specific, are necessarily orders of magnitude) that child victims have included- 2 million killed, 4-5 million disabled, 12 million left homeless, more than 1 million orphaned or separated from their parents, and some 10 million psychologically traumatized.[3]. Over the past decade the United Nations has increasingly focused on the issue of children affected by armed conflict, working to strengthen norms and modify the role of its operational actors. Children's concerns are also being integrated into United Nations peace operations, through mandates, reports, child protection advisers and training.[4]

It is widely agreed that all are vulnerable to superior force, but children may be singled out as one of the groups which are most vulnerable to such. Between 1807 and 1814, a number of individuals as young as 10 to 12 years old were found among the Danish-Norwegian prisoners of war held by the United Kingdom of Great Britain and Ireland, the children having served on vessels later confiscated by British forces.[5] Stories of intentional cruelty to children probably have a long history as well, making the stories of children tortured at the hands of Syrian authorities sadly familiar. [6]Some claim that at any given time at least 300,000 child soldiers participate in hostilities,[7] but this number is probably insufficiently substantiated.[8] However, 20 states would seem to have used children for this purpose during 2010-12,[9] not counting the many non-state entities beyond state control doing the same. 2011 thus saw 316 instances of

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[3]Ibid <www.unicef.org> accessed on 7/03/19

[4]Olara A. Otunnu(Under-Secretary-General Special Representative of the Secretary-General for Children and Armed Conflict)Special Comments (2002)(*Children and Security Journal Vol. 3)*

[5]MagneFrostadChild Soldiers: Recruitment, Use and Punishment(2013) (*International Family Law, Policy and Practice Vol.1)*

[6]RagnhildSofieRygg, Syriske,<*//www.reddbarna.no/nyheter/syriske-barn-tortureres-til-doede*> and Save the Children, Untold Atrocities: The Story of Syria's Children , obtainable from <*//www.savethechildren.org.uk/resources/online-library/untold- atrocities-stories-syrias-children*> Accessed 10/07/2018

[7]EU guidelines on children and armed conflict, 2008, Sec. I.1, obtainable from <*//europa.eu/legislation_summaries/human_rights/human_rights_in_third_countries/r10113_en.htm*> Accessed 10/7/2018

[8] Mark A. Drumbl, Reimaging child soldiers in international law and policy (2012)(*Oxford University Press Oxford , p. 26)*

[9] Child Soldiers International, Louder than words: An agenda for action to end state use of child soldiers (London 2012), p. 18, <//www.child-soldiers.org/global_report_reader.php?id=562> Accessed 10/7/2018.

child recruitment in Afghanistan,[10](similar circumstance obtains in Nigeria with the Boko Haram insurgency)[11] and incidents of children being used by armed groups in Afghanistan as vehicles for suicide bombs – some of them not even aware of the fact that they were carrying explosives.[12] One of these was a boy merely 8 years old.[13]Also illustrating is the forced recruitment of children by The Lord's Resistance Army in 3 African states from July 2009 to February 2012 in no fewer than 591 cases.[14]Force is not necessarily used to engage these conscripts. By appealing to a sense of patriotism - as happened during the prolonged conflict between Ethiopia and Eritrea - children may be persuaded to enlist. Revenge for past grievances may be the motivation – as in the Hutu-Tutsi conflict in Rwanda – or children may simply attach themselves to an army as their only hope of surviving the social dislocations of war. However, in the great majority of cases, recruitment is coercive.

RENAMO's tactic of simply abducting batches of children from their home villages during Mozambique's civil war and putting them under arms is typical.[15]

Two reasons are typically given for the enhanced attention child soldiers have been provided with during the last two decades: An increase in the use of such soldiers, where the use is moving away from auxiliary functions to active participation in hostilities, and a change in society's perception of when a person moves from childhood to adulthood.[16]

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[10] Children and armed conflict, (2012) (*Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, p. 2*

[11]<www.unicef.org> accessed 7/04/2019

[12]Report of the Special Representative of the Secretary-General for Children and Armed Conflict (2012), *(UN Doc.A/67/256, para. 63)* The number is given as 11 in Children and armed conflict, Report of the Secretary-General, UN Doc. A/66/782-S/2012/261, 26 April 2012, p. 2, whereas 11 children were used in the commission of suicide attacks in Pakistan, id., p. 27.

[13]Report of the Special Representative of the Secretary-General for Children and Armed Conflict (2012*), (UN Doc.A/67/256, para. 63)*

[14] Report of the Secretary-General on the situation of children and armed conflict affected by the Lord's Resistance Army(2012), *(UN Doc. S/2012/365, p. 5)*

[15] T W Bennett Using Children in Armed Conflict: a Legitimate African Tradition? *Criminalising the recruitment of child soldiers Institute for Security Studies. PO Box 4167, Halfway House 1685 South Africa.Pg 3*

[16] Matthew C. E. Happold, Child soldiers in international law: The legal regulation of children's participation in hostilities, (2000) (*47 (1) Netherlands International Law Review, pp. 27-52, p. 28)*

The recruitment of child soldiers remains prevalent, and highly topical,[17] and the practice of recruiting children for use as soldiers is a new addition to the corpus of war crimes in international criminal law. This research provides a critical analysis of how the international justice institutions have dealt with the challenges of developing this crime, while also giving effect to the intention of the criminal prohibition: to punish those who recruit children as soldiers, and thus increase the protection afforded to children during armed conflicts.

1.2 Statement of the Research Problem

International Humanitarian law as the law that governs non-Internal Armed Conflict has been facing problems of implementation. This fact is not in doubt. These problems are so copious, posing great difficulty of implementing the law. Children are impacted in various ways and at multiple levels during armed conflicts: some are killed, maimed, abducted to become soldiers or sexually abused, whereas others are psychologically exploited."[18] This Research Project acknowledges that children are not only passive victims in armed conflicts, but that some of them can display "tactical mechanisms to cope with the concrete, immediate conditions of their lives created by their violent military environment."[19]

Nevertheless, the main focus of this research is on the vulnerabilities of child soldiers and the need to improve their legal protection during and after armed conflicts.

As Drumbl notes, while "it seems fundamentally unfounded to stereotype all child soldiers as depersonalized tools of atrocity or as weapons systems industrially committing crimes against humanity", it can no longer be disputed that "where there is armed conflict, invariably, there are child soldiers."[20] The 2016 International Criminal Court (ICC) Policy on Children has

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[17] SOS Children (2013); *AFP (2013); Wired (2013); Save the Children (2013).*

[18] Secretary-General, Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children,(1996)*GA, 51st session, A/51/306 at 4 (GraçaMachel Report).*

[19]Alcinda Honwana, Child soldiers in Africa(2006)*(Philadelphia: University of Pennsylvania Press, at 71*

[20]Mark Drumbl, Reimagining Child Soldiers in International Law and Policy(2012)*(New York: Oxford University Press, at 85, 26).*

recognized that "children are present, both in armed forces of states and in non-state armed groups.[21]

1.3 Research Questions

For the reasons stated above amongst others, this research work has raised the following questions which are peculiar to the use of children in armed conflicts.

1.1 Are there Legal Framework Against the Use of Children in Armed Conflict?

2.1 How effective are the United Nations initiatives on the protection of children during armed conflicts, in essence, why the disconnect between the international discourse on the prohibition against the recruitment and use of child soldiers and the continuing practice of child soldiering?

3.1 Do the terms 'direct' or 'active' participation used respectively by International Humanitarian Law and International Criminal Law properly capture the status of child soldiers?

4.1 Should child soldiers be held liable for war crimes, are child soldiers victims or war criminals?

5.1 Are there effective recovery and reintegration programmes in place for child soldiers?

1.4 Aim and Objectives of the Study

The Aim of this research work is to examine the phenomenon of child soldiers as perpetrators of crimes and as victims, as well as to analyse the issue of criminal liability for using child soldiers under international law. Accordingly, the research sets out to achieve the following objectives: -

1 To evaluate the level of compliance with International legal standards regulating the use of children in armed conflicts.

[21]Muzima, Anaise, "Re-imagining the scope of children's legal protection during armed conflicts under International Law" (2017).*Master of Laws Research Papers Repository. 1. <//ir.lib.uwo.ca/llmp/1> accessed 7/4/2019*

2 To explore the use of the words "direct" or "active" participation as employed in the statutes and how the use words affect the status of child soldiers.

3 To analyse the liability of children used in armed conflicts for crimes committed by them.

4 To make recommendations on how state parties can end the culture of impunity, bring to a stop the use of children in armed conflicts and suggest effective recovery and reintegration programmes for child soldiers.

1.5 Significance of the Study

In many conflicts, millions of children are "not merely bystanders, but targets."[22]The deliberate targeting of civilians, especially children continues to intensify. While this situation is partly a result of the violations of International Humanitarian Laws, this does not preclude the need to examine the efficiency of the current protection regime and its vulnerability to abuse. The armed conflict in Afghanistan highlights this need. Statistics indicate that 5 children were killed in 2009 by regular armed forces,[23] whose combatants are required to respect the laws of armed conflict. This case is one among other incidents which indicates the need to revise the adequacy of the existing standards.

1.6 Scope and Limitations of the Study

This research focuses on the international legal framework for the use of children in armed conflict, A preliminary question here is the extent to which human rights conventions, such as the United Nations' 1989 Convention on the Rights of the Child (CRC), are applicable extraterritorially. This issue has generated much writing in relation to other global and some regional human rights agreements, but has been comparatively less considered in relation to the CRC. The question is then whether a state party is bound by the relevant obligations when

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[22]Ibid P. 5

[23]Special Representative of the Secretary-General for Children and Armed *Conflict Radhika Coomaraswamy, in a press conference on 1 March 2010.* <*http://www.un.org/News/briefings/docs/2010/100301_Children.doc.htm*>accessed 7/4/2019

it deploys troops abroad, i.e. not on territory to which the said state itself has made the CRC applicable thorough a declaration, [24]e.g. when recruiting local youth as interpreters to its troops or as outer perimeter guards at its foreign bases. Under Art. 2 of the CRC, parties "shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction…". The general trend with the extraterritoriality of UN human rights conventions is to make them applicable abroad when a state party holds sufficient control over a person or territory.[25] It is only to be expected that the Committee on the Rights of the Child will subscribe to this view.

Additionally, one must consider whether another entity than the state actually undertaking the relevant acts or omissions may be held solely responsible for them. It is also here to be expected that the Committee on the Rights of the Child will adopt the approach of the Human Rights Committee. That committee held in its General Comment No. 31 from 2004 that a party's responsibility remains even where its public servants only constitute a national contingent assigned to an international peace-keeping or peace-enforcement operation.[26]

This research is limited to the conduct and regulation of Non-International Armed Conflicts. It would seem as if there are three ways to prevent the recruitment of child soldiers: Effective legal prevention mechanisms at the national level, strengthening community protection mechanisms at the local level and providing children with alternatives to mobilization. As to the current developments, some progress has been made in eliciting commitments from armed forces and groups to end the recruitment and use of children, however, a lot is left to be desired especially in the area of alternatives to mobilization especially in the wake of insurgency in

[24]http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en accessed 7/4/2019.

[25]MagneFrostadChild Soldiers: Recruitment, Use and Punishment (2013) (*International Family Law, Policy and Practice Vol. 1)*

[26] General Comment No. 31 (2004) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, (*UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2006, para. 10)*

Nigeria. It is also impossible for this research to access all the available materials on Child Soldiering due to the cost and time factor.

1.7 Research Methodology

The method used in undertaking this research is the doctrinal approach, empirical support by evaluation of the quality and scope of materials, and a thorough analysis of the level of effectiveness of extant rules and listed academic resources. It is a library based survey and study of relevant statutes, case law, journal articles and other works of scholars on the internet. The first challenge of the research is to identify statutes that fit into the field of study. This requires an examination of normative content rather than nomenclature or headings. The choice of statutes in this regard admits of some arbitrariness given that the field of study itself is yet to be clearly marked and therefore a researcher is at liberty to beam light on any area of interest. The study therefore undertook critical perusal of statutes and case laws to distil the rules; understand the expositions and also analyse the effect of the rules.

The research is doctrinal or library based. No experiment, raw or field data is required. But as with doctrinal research, information accessed from both primary and secondary sources were subjected to rigorous reasoning and analysis in reaching the conclusions enumerated at the end of the study.

The primary sources of materials used in the research are the relevant statutes and case laws. The statutes include: 1926 The Slavery Convention, 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1950 Statute of the Office of the United Nations High Commissioner for Refugees, 1951 Convention relating to the Status of Refugees, 1969 Convention Governing the Specific Aspects of the Refugee Problem in Africa, 1973 International Labour Organization Convention 138 Concerning Minimum Age for Admission to Employment, Guide on International Human Rights and Humanitarian Law on Children in Armed Conflict, 1977 Geneva Protocol I Additional to the Geneva Conventions of

12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1989 United Nations Convention on the Rights of the Child, 1990 African Charter on the Rights and Welfare of the Child, 1993 Statute of the International Criminal Tribunal for the former Yugoslavia, 1994 Statute of the International Criminal Tribunal for Rwanda.

Others are; the 1995 Beijing Platform for Action, 1996 Amended Protocol II on Prohibitions or restrictions on the Use of Mines, Booby-Traps and Other Devices to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects 1980, 1997 Convention on the Prohibition of the Use, Stockpiling, Production and the Transfer of Anti-Personnel Landmines and on their Destruction (Ottawa Treaty), 1997 Mandate of the Special Representative for Children and Armed Conflict, 1997 Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa, 1998 Guiding Principles on Internal Displacement, 1998 Rome Statute of the International Criminal Court, 1999 International Labour Organization Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 Recommendation 190 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 Lomé Peace Accord (Sierra Leone), 1999 United Nations Security Council Resolution 1261, 2000 Arusha Peace and Reconciliation Agreement (Burundi), 2000 Truth and Reconciliation Commission Sierra Leone provided for in the Lomé Peace Accord 1999 Article XXVI, 2000 Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000 Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000

United Nations Security Council Resolution 1306, 2000 United Nations Security Council Resolution 1314, 2000 United Nations Security Council Resolution 1325, 2000 Resolution 1709 of the Organization of American States on Children and Armed Conflict, 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention on Transnational Organized Crime , 2001 United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, 2001 United Nations Security Council Resolution 1379, 2002 Statute of the Special Court for Sierra Leone, 2002 Inter-Agency Standing Committee Task Force on Protection from Sexual Exploitation and Abuse in Humanitarian Crises, 2003 United Nations Security Council Resolution 1460, 2003 Protocol V Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, 2003 European Union Guidelines on Children and Armed Conflict, 2003 Child Rights Act (Nigeria), 2004 United Nations Security Council Resolution 1539, Organic Law N°16/2004 of 19/6/2004 Establishing the Organisation, Competence and Functioning of Gacaca Courts, 2005 United Nations Security Council Resolution 1612, 2006 United Nations Convention on the Rights of Persons with Disabilities, 2006 United Nations Security Council Resolution 1674, 2008 Convention on Cluster Munitions, 2008 United Nations Security Council Resolution 1820, 2009 United Nations Security Council Resolution 1882, 2009 United Nations Security Council Resolution 1888, 2009 United Nations Security Council Resolution 1889,

Some decided cases have been alluded to in the research, though the cases are few due to the fact that this area of Law is still relatively new and is still being tried. The principles involved in some of the cases are similar. In some cases, legal rules are exposited, and in other cases the principles are expounded and extended while in some cases, established principles or

rules are restricted. Some of the decided cases include:Prosecutor v. DuskoTadic,[27], Appeals Chamber, Decision, 2 October 1995, Prosecutor v. Thomas LubangaDyilo,[28]Trial Chamber Judgment, (March 14, 2012), Prosecutor v Zlatko Aleksovski,[29] (International Criminal Tribunal for former Yugoslavia, Appeals Chamber) online, Prosecutor v Erdemovi,[30](International Criminal Tribunal for the former Yugoslavia, Trials Chamber), T v. United Kingdom and V v. United Kingdom,[31]Ministère Public v. Nzabonimpa,[32] US v Omar Khadr,[33] Hamdam v Rumsfeld.[34]

These consist of earlier works of other researchers which are being examined to ascertain their relevance or otherwise to the present study. Through this sources necessary hindsight as well as guidance are provided to help focus the study on relevant areas in which value can be added to knowledge to bring about development and reform in the field of study.

The research examines several books, journal articles, official publications, internet sources and online materials for scholarly views relating to the subject matter of the research. In this regard, materials from other common law jurisdictions are also alluded to.

In every research work, methodology is determined by the subject matter of the research. The Doctrinal approach was considered to be the most suitable in the circumstance of the present study, thus primary and secondary data were considered. The primary materials or sources consist of the authoritative accounts of the law by the law-making authorities. On the other hand, secondary materials comprise of all publications or information rendered on legal rules but which are not themselves the authoritative record of the legal rules. It includes;

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[27] (ICTY) IT-94-1-AR72)
Case No. ICC-01/04-01/06[28]
[29] IT-95-14/1, Judgment (24 March 2000) at para 185
[30] IT-96-22-Tbis, Judgment (5 March 1998) at para 16
[31] [2000] 30 EHRR 121
[32] RMP 69.430/S4/KD, RP/R1/98 (28 December 1998),
[33] Case No 05-0008, United States Military Commission
[34] [2006] 548 US 557. 1

textbooks, journal articles, newspaper reports, commentaries, studies and reports of scholars and data and reports of administrative agencies and groups.

Doctrinal research asks what the law is on a particular issue. It is concerned with analysis of the legal doctrine and how it has been developed and applied. It consists of either a simple research directed at finding a specific statement of the law or a more complex and in depth analysis of legal reasoning.

Here we are concerned with the philosophy of law and the topics involved are restricted. They mostly focus on the nature of law and legal authority; the theories behind particular substantive areas of law, such as torts or contracts; and the nature of rights, justice and political authority. Others may study the legal decision making process, and the theories of legal interpretation and legal reasoning. We use this approach to study legal doctrine and the underlying theory behind the doctrine.

The research examines the several international, Regional and Local Statutes with bearing on the protection of children during armed conflicts, relating to their economic, social and political rights. In addition, the institutions which are responsible for the provision of enabling environment and framework for administrative regulation and protection of children during armed conflicts were examined in their normative sense as primary sources in line with the aim and objectives of the research. Case law constitute primary source of law and the research examines the enormous body of case law that have relevance to the issues considered in this study. Case law as a source of law reflects the view of judges when they decide cases that come before them and the decisions acquire the force of law thereby making the rules and principles binding and applicable to subsequent cases through the doctrine of precedents. Case Law was also relied on in this work.

For a full grasp or understanding of primary sources the secondary materials on the topic are always of great importance. Although primary sources represent the normative

prescription, secondary materials have in practice of law come to acquire significant influence on the interpretation of the primary or basic laws. Accordingly, opinions expressed in by scholars in books, journal articles and other sources were also examined.

Although the research adopts the doctrinal method, studies which aims at ascertaining the adequacy or otherwise of normative prescriptions cannot altogether avoid non-doctrinal methods. Consequently, the research intends to be flexible in methodology and the preference is not informed by doctrinal confusion but more by the need to satisfy the aim and objective of the study in the most impactful manner. The choice of methodology calls for a brief clarification on the relationship between doctrinal and non-doctrinal research methods. This is necessary in order to show that while the two methods connote different methods they are not exclusive of one another in legal research.

The data in this research is obtained from both primary and secondary sources and would be examined from the perspectives of: design, exposition of rules and analysis of effect of the rules.

The research examines the primary sources to distil and bring out the normative rule as espoused in the text. Rules are enacted by the legislature to be interpreted or construed by the court. The expression employed by the legislature often gives the needed insight to the intention of the law-giver. But since neither law nor society is immutable or inorganic, the context of the enactment as well as the context of their operation may sometime need to be understood in order to properly execute the intention of the legislature. Consequently, the research approach legal rules by first considering the text of the primary sources. This approach uses in an optimal manner both primary and secondary materials to interrogate the research problem in such manner as to evince the pertinent findings disclosed.

The research reveals on a theme-by-theme basis the resultant or potential effect of a given rule of statute or case law. An appraisal of the result inevitably shows the level of protection available to children involved in armed conflicts.

The methodology enabled the research to access both primary and secondary materials in interrogating the impact of normative as well as institutional provision on human rights. Some of the secondary sources furnished data on pertinent social facts as to obviate the need for a field study. But more importantly, the methodology brings out grey areas for legislative attention in much the same way that human rights advocacy groups have been afforded a graphical view of human rights. Opinions of scholars have also enriched discussion on the theoretical perspectives. The significance of a methodology which furnishes a platform for useful exchanges and dialectics among stakeholders in a social phenomenon cannot be overemphasised.

1.8 Synopsis of the Chapters

This research work is structured into five distinct chapters:

Chapter One introduced the topic which is the use of children in armed conflict. The chapter also offered definitions of key terms such as "child" in the context of child soldiering, and who should be held liable for the conscription of children in armed conflict. It further depicted the applicable yardstick for the characterization of Children and Armed Conflict with the intention to further distinguish same with other type of conflicts in the succeeding chapters. Chapter one also made a skeletal analysis of the statement of problems likely to evolve in the liability for the use of children in armed conflicts. It also cited some instances, conditions, circumstances or situations of armed conflict, where children were involved. The chapter described the factors that contribute to the involvement of children in armed conflicts and briefly examined the significance and scope of the study, then defined a few key terms.

Chapter Twodealt with the conceptual framework, reviewed some previous work, relevant to this study and delved further into the practice of involving children in armed conflicts both by state parties and by rebel groups. It also examines the theoretical framework for the involvement of children in armed conflict.

Chapter three hinged on the legal framework for the involvement of children in armed conflict. International conventions against the use of children in armed conflicts were discussed as well as the regional and domestic laws governing the topic. Furthermore, the chapter discussed the institutional framework set in place to ensure compliance with the laws in place. Consequently, The Laws with bearing on the protection of children in armed conflicts relating to their economic, social and political rights were discussed in addition to the institutions which are responsible for the provision of enabling environment and framework for administrative regulation and protection of children in armed conflicts were thoroughly examined in their normative sense as primary sources in line with the aim and objectives of the research

Chapter four examines parallel legal paradigms, other than IHL, applicable to children during armed conflicts. It focused on the human rights of children during the conduct of hostilities, namely the right to life, in an attempt to seek additional guidelines and legal norms discerning the lack of clarity in the existing IHL rules with regards to attacks on targets involving children. The challenges involved in determining the liability for the use of children in armed conflict and prosecution of perpetrators was discussed in Chapter four of the research, the research focused on the treatment of children as a distinct group

Chapter five is the conclusion of this research work with the summary of findings, observations made in the course of this research and recommendations. The chapter also discussed how the study will contribute to knowledge offering suggested areas for further studies.

CHAPTER TWO

LITERATURE REVIEW

2.1 Conceptual Framework

Some basic terms are key to this research work; therefore, it is necessary to clarify such terms for the better understanding of the subject. The study considered Armed Conflict, child soldier, liability and other key terms for clarification as follows: -

2.1.1-Armed Conflict

The term Armed Conflict is not expressly defined by the Law. In what appears to be a comprehensive definition of the term, containing its scope and duration of application of the law was provided in the case law by the International Criminal Tribunal of the former Yugoslavia, thus:

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[35]

This very definition has covered both International and Non-International Armed Conflicts.

It is significant to state that the International Criminal Tribunal of former Yugoslavia has grossly contributed to the development of International Humanitarian Law.

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[35]*Prosecutor v. DuskoTadic,(1995)* ICTY IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995; <http://www.un.org>*accessed 16th November 6, 2017*

An author, Smith, D. considered "Armed Conflict" as "open, armed clashes between two or more centrally organized parties, with continuity between clashes, in disputes about power over government and territory."[36]

Armed Conflict is also defined as a state war between states or societies. It is generally characterized by extreme atrocities like wanton aggression, destruction, and mortality, using regular or irregular military forces.[37]

2.1.2 Child Soldier

Article 38 (2) of the UN Convention on the Rights of the Child imposes on the member states the obligation to ensure that children under the age of fifteen (15) do not participate directly in hostilities. Protocol II to the Geneva Conventions prohibits the participation of children under the age of 15 in the armed conflicts in any form – directly (fighters, guards, weapon carriers, live targets etc.) or indirectly (spies, messengers, burden carriers, secretaries, cooks, workers, for sexual services, back support.

The Child Rights Act which prohibits the use of Nigerian children in armed conflicts defines a child as one who is below the age of eighteen (18) years. It categorically provides that such a child's best interest shall remain paramount in all considerations.

The Children and Young Persons Act makes a distinction between "child" and young person". It defines a child to mean a person under the age of Fourteen (14) years while a young person is a person who has attained the age of fourteen (14) years but is under the age of seventeen (17)

"Child soldier" has also been defined as "anyone under the age of eighteen fighting with an armed group.[38] "Armed group," is used according to the manner in which it is used in

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[36] D. Smith, Trends and Causes of Armed Conflicts (2004). *(Bergrhof Research Centre for Constructive Conflict Management,) <http://handbook.net/document/smith-handbook-fit> accessed 11th/12/2017*

[37] Warfare *(edited. December, 2017), <https://en.cambridge/dictionary.org//War>accessed 11/12/2017*

[38] Zakaria Dabone', International Law: Armed Groups in a State-Centric System (2011), (*93 int'l rev. Of the red cross 395, 397).*

international law: "Armed groups are made up of individuals over whom the state on the territory of which they operate wishes to maintain special control thanks to its internal laws. As such, armed groups do not benefit from the same status as government forces. In internal law, or in the language of the public authorities, the members of armed groups simply refuse to obey the law; they are bandits under ordinary law, terrorists, stateless persons who can be punished for the mere fact of having taken up arms. In international law, no instrument places insurgents on an equal footing with government troops. Armed groups therefore have relatively low status in international law, when it applies.[39]

Flowing from the above, it is clear that disparities exist as to the fundamental issue of determining who a child should be. The researcher will adopt the age of fifteen (15) as the bench mark for a child soldier for the purpose of this research in compliance with the United Nations Convention on the Rights of a Child.

2.1.3 Liability

Cambridge English dictionary defined the term liability as a state of being legally responsible for something[40]. It is not in doubt that leaders of rebel groups will be held liable for recruiting children into their armies. However, who will be held responsible when children are recruited into state armies? Closely related to this is the issue of what to do with children who commit war crimes? Will they be considered as victims or offenders?

The debates during the various processes of drafting Laws to protect children during armed conflicts indicate that children are allowed to volunteer and fight as they represent "a military edge"[41] or that they make the best soldiers. The point however is, whether it is justifiable to

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[39]Zakaria Dabone', International Law: Armed Groups in a State-Centric System (2011), (*93 int'l rev. Of the red cross 395, 397).*

[40]Cambridge English Dictionary<*https://dictionary.cambridge.org/dictionary/english/combatant*> *accessed 6/4/2018*

[41] The US Position on 17 year old volunteers, they state that the 17 year old volunteers are a military necessity see <*http: //www/hrw/org*> *and US campaign to stop the use of child soldiers* <*http: //www. us-childsoldiers. org/*> *accessed 21/4/2019*

state military necessity as an excuse to use children as soldiers, and must we assume that since no law exists prohibiting it, the practice is within the keeping / protection of law? Since it appears that its legitimacy is being argued, is it a legally acceptable practice though morally abhorrent? Do states prohibit it or accept it and should they therefore legalize it? It is for these reasons that a study of compulsory, forced, voluntary and induced recruitment with emphasis on the recruitment practices of non-governmental forces will be made. An analysis of the role of government and non-governmental forces in the practice of recruitment and subsequent participation will be made. Identification of states and non-state entities which conscript or accept the enlistment of children below the age of 18 is beyond the scope of this chapter however; examples whenever relevant will be given. An attempt will be made to state the rules and standards applicable to this practice, to explore the legal gaps in the scope and substance of law with reference to child participation in armed conflict and possible methods of implementation of human rights standards.

2.1.4 Recruit

The Oxford dictionary[42] defines a recruit as "a serviceman or woman newly enlisted and not yet fully trained" it defines recruitment as "to enlist a person as a recruit" to form an army by enlisting recruits, get or seek recruits, to replenish or invigorate numbers (by the process). Recruitment can be of different kinds, the most common one is when people enlist to become a part of a regular i. e. professional armed force that form part of the state or governmental organs. Irregular forces indicate non-governmental entities. The basic difference between the two is the "belonging" to the state, the training, and the structure of the forces itself. Irregular forces can mean anything from opposition forces, guerrilla forces, mercenaries to auxiliary forces. Is there any difference in the experience of children serving with regular as opposed to those serving in irregular forces? According to the analysis presented in The Defence

[42] <https://en.oxforddictionaries.com/> *accessed 21/4/2019*

Monitor,[43] there is no major difference between what children experience, as they fall under the same military laws as adult soldiers. Attempts to escape are often met with death by shooting or severe beatings. Treatment of captured child soldiers is often brutal by either side. The different kinds of recruitment are voluntary recruitment, conscription, and forced recruitment.[44]

2.1.5 Voluntary Recruitment

This indicates an enlistment by choice, a decision made without any coercion: Often individuals enlist to join as soldiers or pass tough exams to qualify for the armed forces. Most of these entrants are choosing to make a career as professional soldiers in a country's armed forces. Most countries with professional armies tend not to recruit individuals below 18. The lack or excess availability of man power normally depends on the pay scale and other socio-economic factors in the country and yet, there are states like the UK and the USA that allow individuals below the age of 18 to enlist in their armed forces. In the US, 17 year old children/ individuals can volunteer to join the army with parental consent. The UK allows a person to enlist in the forces once they leave school. By the age of 17 years and 3 months they are eligible for active duty.[45] There are instances when individuals enlist or volunteer. But there may be a number of reasons or motivations that an individual may feel motivated to enlist, they could be cultural, religious and political motives `*Dulce et decorum est pro patria mori,*[46] In fact, "appeals to these fundamental drives has been necessary to induce men to engage in modern war and has also played a part in giving to modern war its peculiarly unrestrained character".[47]Reasons for volunteering could also include revenge, physical or structural

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[43] The Defence Monitor,(1997)*vol. XXVI, No 4, Washington DC, < http: //www. cdi. org/dm/1997/issue 4> accessed 25/1/2019*

[44]Chitralekha Marie Massey, Child Soldiers - Theory and Reality of their Existence: the Question of International Protection Available to them in Contemporary Times<*http://eprints.nottingham.ac.uk/11743/1/364412.pdf*>. accessed 15/07/2018

[45]ibid

[46]Horace Odes, *iii, 2,14. Homer Iliad, xv 583.*

[47] Nickerson, *H.,Can We Limit War, Bristol, 1933, pp 114 and 198.*

violence, social and economic injustice, militarization of daily life, lack of options etc. Occasionally a government's failure to curb violent abuse of fundamental rights and disregard for its citizens has also led to rise in voluntary recruitment. Another example would be, Britain at war with Argentina over Falklands in 1982. This occasion resulted in a boost in terms of nationalism. Interestingly, this also led to Mrs Thatcher getting a lead in the popularity polls. This concept of politicians occasionally using nationalism and related ideas to achieve gains, is reiterated by Hegel's idea that by arousing the passion of solidarity, war makes nations or at least revives them. Hence, nationalism with a political clout does tend to increase the number of enlistments.[48] Another example is that from Uganda where a number of volunteers were helped by a local recruiting officer who organized for eleven boys from a village to escape at night in a lorry and join the rebels who were camping at Kasesse camp.[49] In most instances when children have been driven to leaving homes and families and fending for themselves, for example as street children, the reason has been hunger, and war. Other, "push -factors" that lead to a breakdown of the family are famine, caused by drought and desertification, insecurity food, freedom, romanticized picture of urban life, school, education, money, jobs, etcetera.[50] These children are more prone to either volunteering or fighting in armed conflict and or also tend to get press-ganged into fighting. As has been submitted earlier, children below 18 are not always capable of making the best decision in their favour, and when required, it is justified in intervening. Accordingly, when children between the ages of 15-18 volunteer, it is the duty of the State body or the recruiting body to reject the enlistment. International law as we know currently allows 15 and above to be recruited. Though there have been changes developing the issues of effective monitoring and preventing further recruitment remains.

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[48]Chitralekha Marie Massey, Child Soldiers - Theory and Reality of their Existence : the Question of International Protection Available to them in Contemporary Times<*http://eprints.nottingham.ac.uk/11743/1/364412.pdf*>. accessed 15/07/2018

[49] See page 14-15 of Monday, February 7,1994, The New Vision, published in Kampala, Uganda

[50] 8 Dodge , CP., Raundalen, M., Reaching Children in War : Sudan, Uganda and Mozambique, Sigma Forlag : Sweden, 1991, *p43-44*

2.1.6 Conscription

This is the compulsory enlistment for state service, commonly known as "military service". Conscription policies vary from country to country and are usually laid down in the national constitution and regulated by the national law of the country. For example, the age of conscription varies from an unclear position in Iran to 18 or 21 in most other cases. This normally involves spending one year to 18 months in military service. It is mostly aimed at males. The problem of course is in countries like Afghanistan, age is not taken into account as long as there is a need for soldiers, all males are conscripted to fight as has been known to happen in many other countries during war time.

2.1.7 Forced Recruitment

This entails the threat or actual use of force or violation of the physical integrity of the individual or someone close to him or known to him. This is found to have been practiced by both national armed forces and armed opposition groups. There exists a very unclear line between what is voluntary and involuntary in many cases. In some states it has been noted that even though official legislation exists that draws a clear line as to the minimum age of recruitment being over 18, they do sweep up under-age adolescents along with other adults. In El Salvador,[51] Guatemala, Ethiopia and Burma it has been reported that when numbers are needed to fill up the ranks in government forces, young men are picked up from streets, buses, playgrounds, churches, schools etc. For example in Burma, when a confrontation is expected, the recruitment drive was intensified in both the rebel and state forces.[52] Forced recruitment as seen in Uganda was that of abduction and use of physical and mental violence by the Lord's Resistance Army led by Joseph Kony to force these children to fight.[53] It is submitted that as

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[51] Americas Watch and Lawyers Committee for International Human Rights, Free Fire,(1998)(*A Report on Human Rights in El Salvador, August 184, Fifth Supplement.* See also "Youth under Fire: Military Conscription in El Salvador", *Centre on War and The Child, Ark.)*

[52]Burma Issues Representative in Conversation, 1995.(*Mae Sot Refugee camp, Thailand).*

[53] Coalition to Stop the Use of Child Soldiers(1999). (*The Use of Children As Soldiers in Africa: A Country Analysis of Child Recruitment and Participation in Armed Conflict, Geneva, p 114.)*

emergencies develop, voluntary recruitment is giving way more frequently to forced conscription and press-ganging.

A disturbing aspect that emerges is the "simple idea that certain types of behaviour which are usually condemned are nevertheless permitted in war, since war is a special circumstance".[54]Today's child soldiers experience great brutality and trauma the young recruit is intimidated to the point where their socialization pattern is broken down and they actually accept the gun willingly. Then they are forced to kill someone they know. This typically means going back to the home village or community and killing someone known to the recruit in front of the community. This effectively closes the possibility of returning back to a life within this community for this child. Over a period of time, it seems that a number of recruits start to identify with the captors and the cause of their fight. It should not be forgotten that the Hague Convention on civil aspects of International Child Abduction (1980) in its preamble aims "to protect the children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure prompt return".

2.1.8 Cadet Schools/Military Schools

There are military schools in many states. They are usually a state run institution, associated with the government. They accept children at an early age, some accepting children as young as seven, others slightly older. These children grow up in a military environment. Not all but most tend to move straight into the military academies from these schools. Rwanda and Burundi show that military schools serve as "backdoor recruitment into the armed forces of tens of thousands of children". [55] Even ordinary schools may have cadet programs, for e. g. in India it is the National Cadet Corps (NCC) which are found in schools and colleges. Children and young people have one day a week of regular training where they wear a uniform and

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[54]Melzer, Y., Concepts of Just War, *Martinus Nijhoff: Leyden, 1975, p64.*

[55] Coalition to Stop the Use of Child Soldiers,(1999)(*The Use of Children As Soldiers in Africa: A Country Analysis of Child Recruitment and Participation in Armed Conflict, Geneva, p 6)*

undergo special training. There exists a special quota for NCC cadets to join the defence forces. In the US for example, there exist quasi - military organizations like "Young Marines" or "Junior Reserve Officer Training Corps". The latter is a program administered by the Pentagon in high schools. Its staff consists mainly of retired military personnel. Subjects include - cross country navigation, marching, uniforms, marksmanship training, military history etc. The rationale behind this is that they are "ways to occupy children, to socialize them and to teach them discipline". [56]

2.1.9 Culture, Tradition and Human Rights

While the harm done to children personally and to society generally is at first sight morally indefensible, the practice of conscripting child soldiers in Africa is being justified as an African cultural tradition. Before assessing the validity of this claim, we need a clear understanding of what is entailed by culture and tradition.

Culture is an amorphous concept denoting anything that contributes to the unique character of a social group, thereby distinguishing it from other groups. It follows that culture may include artifacts, language, laws, customs and moral codes, in fact, a people's entire intellectual and material heritage.[57]Tradition, which is the process of transmitting knowledge and beliefs to future generations, is part and parcel of culture. Not only is tradition the means for keeping a culture alive but it is also the means whereby items of culture gain moral authority. Thus, the continuity or persistence of a practice over time is the principal way of testing its nonnative value.[58]

A people's sense of their culture presupposes their conviction that they differ from other groups (together with recognition of this difference by a wider society). The differences might not be

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[56]Colonel. DM Smith The Culture of Children with Guns*26 March, 1998*

[57] T W Bennett Using Children In Armed Conflict: A Legitimate African Tradition? *Criminalising The Recruitment Of Child Soldiers Institute for Security Studies. PO Box 4167, Halfway House 1685 South Africa*

[58]Ibid pg 4

great - Serbs and Croats in the former Yugoslavia and Protestants and Catholics in Northern Ireland are well- known examples of very similar cultures - but to the people concerned they are vital. Self-awareness suggests in turn that members of the group have gained a certain distance from their culture, in other words, that they have begun to reflect upon what they do and think.

The successful justification of a morally suspect social practice on the grounds of culture needs an audience sympathetic to cultural relativism. (More specifically, to persuade a human rights activist that using children in armed combat is right or legitimate would require a high degree of tolerance for deviation from the clear prohibition laid down in the international code of children's rights.) Earlier this century, cultural relativism was something of a dogma in western intellectual circles. For instance, the executive board of American Anthropological Association objected to the proposed Universal Declaration of Human Rights in 1948 on the grounds that it would encode a set of Euro-American values. Hence, in its comments on the provisions of article 5, which dealt with the prohibition on torture or cruel, inhuman and degrading treatment, the board refused to condemn the standards of other cultures: "what is held to be a human right in one society may be regarded as anti-social by another people.".[59]

Once it was accepted that the boundaries between social groups can never be absolute, it followed that cultures must always be fluid and that different groups will share common practices and institutions. (No clearer evidence was needed than the global spread of that icon of American culture, Coca Cola, even in the former Soviet bloc and the Islamic world, two areas highly resistant to western influences.) Conceding this point led inevitably to the charge that all cultures are derivative.[60]

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[59] Ibid pg 7

[60] T W Bennett Using Children In Armed Conflict: A Legitimate African Tradition? *Criminalising The Recruitment Of Child Soldiers Institute for Security Studies. PO Box 4167, Halfway House 1685 South Africa*

The fact that a culture is not truly indigenous, however, does not necessarily imply that it is somehow unauthentic. Rather, the objectivity entailed in defending a culture and the existence of shared cultural practices suggests that cultural traditions are created and that the process of their creation may be contested. Deciding which elements will determine a culture involves choice. What is considered culturally typical can clearly never comprise the totality of a group's ideas, material output or behaviour. Only a limited number of traits - selected from clothing, language, values, habits or whatever - are chosen as emblems of cultural uniqueness. Over time, as the group changes, these distinctive features are changed.

When we appreciate that culture is a conscious construction, we must realise that it can be manipulated by dominant forces in a society to achieve particular ends. The successful justification of a morally suspect social practice on the ground of culture needs an audience sympathetic to cultural relativism had taken it for granted that culture was the spontaneous outgrowth of community practice, the product of some sort of primordial democracy. Critical scholarship of the 1960s, however, showed that particular ideas and practices were usually generated by elite groups or even imposed by outsiders.[61]

Possibly the best example of the latter point was the heavy emphasis the South African government placed on the distinctiveness of African cultures in order to justify apartheid. The segregation of black and white and the further division of the African population into 10 homelands would have seemed at best arbitrary, or even worse self-serving, if the government had not rationalized its policy by generating notionally separate cultural traditions. Hence, although diverse forces had drawn the people of South Africa together to share common places of work, worship, transport etc, they were forced apart to live in separate areas, to work under

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[61] T W Bennett Using Children In Armed Conflict: A Legitimate African Tradition? *Criminalising The Recruitment Of Child Soldiers Institute for Security Studies. POBox 4167, Halfway House 1685 South Africa*

different conditions, to learn in different schools, and, eventually, to take different citizenships. This costly experiment was celebrated as the logical outcome of different cultures." [62]

The international human rights movement has a well-nigh invincible authority, since it rests on a claim that human rights represent universal values. By implication, these values are culturally neutral (and arguments of cultural relativism are therefore redundant). There is no need to accept this universalist claim at face value, however, for it is clear that human rights originated in western systems of law and philosophy. If that is so, an African apologist could contest the precedence given to international human rights by pointing to the fact that the continent has its own culturally unique way of securing human dignity. Since human dignity is also the value underlying all human rights, this argument has an immediate plausibility.

The first response would be that African nations have been eager to accede to international human rights instruments, especially the United Nations Convention on the Rights of the Child (1989). This treaty, with its decidedly western slant, provided the inspiration for Africa's own Charter on the Rights and Welfare of the Child (1991).[63]The second response would be to acknowledge that, although Africans are entitled to preserve their cultural heritage, the welfare of children takes priority over cultural rights.

Most human rights instruments guarantee both individual rights and a right to culture. Contradictions between the two are bound to arise. In the event of a conflict, which right should prevail? At the outset, it must be noted that a "right to culture" is ambiguous. The right can be interpreted to mean entitlement to participate in a culture entitlement to demand recognition preservation of its cultural identity)" individual may assert the right against

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[62]Thornton in E Boonzaier& J Sharp (1988) *(South African Keywords: JJ^S and political concepts. David Philip, Cape Town)*

[63] International Covenant on Civil and Political Rights provides that: "persons belonging to ... minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture ...."*Which is governed by article 17(2) of the African Charter on Human and People's Rights and article 30 of the UN Convention on the Rights of the Child.*

would have the duty to admit new case, the group may assert its right would be obliged to take cognizance tradition).

A third interpretation of the right to culture would allow a group to insist that its members remain true to their cultural tradition whatever the predilection of particular individuals. This understanding has found no support in International Human Rights Law, principally because it would entail denying the first interpretation the individual's free choice to decide whether to participate in a culture or to abandon it. In view of the fact that cultures might be imposed or "created" to achieve ulterior ends, such a construction of the right to culture is prudent. Where a culture works to the benefit of a specific group, there could be no ground for disturbing an individual's claim to fundamental human rights. The conflict between individual and group rights is especially acute where children are concerned. Whose interests should prevail: those of the group or those of the child? African tradition stressed the welfare of the extended family and the immediate political community. Individual interests were submerged in the common weal and the normative system stressed an individual's duties rather than rights. Children had no especially favoured position.[64]

Conversely, the most important tenet of the human rights law on children is that a child's interests are to be given paramount consideration. This principle is encoded in the UN Convention on the Rights of the Child', the African Charter on Children's Rights, and the Child Rights Act.[65]Admittedly, "the child's best interests" principle is vague, and it is said to be an open invitation to apply whatever cultural norms on upbringing happen to be current. Yet, because the principle is worded in relative terms, it performs the vital function of ranking contradictory claims or rules. Hence, whenever the right to preserve a culture comes into conflict with a child's interests, the latter prevail. Article 21 of the African Charter on

[64]ibid
[65]2003

Children's Rights is a case in point: it prohibits cultural practices that might be prejudicial to a child's health or life. Not only are the wellbeing and safety of children of overriding importance but group rights to culture are relatively weaker and subordinate to other human rights

The issues above indicate that to construct what might be called an "Africanist" argument in favour of using children for military purposes is a daunting prospect. In the first place, clear evidence would be needed of a constant, uniform usage in Africa. If such a tradition did exist, was it perpetuated into modern times or was it recreated to serve new and contemporary purposes? Related to this question is whether those asserting the cultural tradition are the only ones to support it. If the evidence discloses no general social acceptance, there seems no good reason to permit the practice, given the compelling moral weight of modern human rights norms.[66]

2.1.10 Perpetrator or Victim?

International discourse is on-going on the victimization that occurs regarding children engaging in armed conflicts. "The dominant view in international law is that minors who have committed international crimes, such as genocide, crimes against humanity or war crimes, are victims of the adults who recruited them and are not legally culpable."[67] While children recruited, whether voluntarily or involuntarily, do face incomprehensible trauma, they are also perpetrators of some of the most violent crimes in conflicts around the world.[68] The categories of victim and perpetrator for child soldiers are not mutually exclusive. In fact, child soldiers often oscillate between the two. One child's involvement in the armed conflict in Sierra Leone illustrates the

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[66] T W Bennett Using Children In Armed Conflict: A Legitimate African Tradition? *Criminalising The Recruitment Of Child Soldiers Institute for Security Studies. POBox 4167, Halfway House 1685 South Africa*

[67] PacifiqueManirakiza, Les Enfants Face au Syste`me International de Justice(2009) *'(A la Recherche d'un Mode'le de Justice P'enaleInternationale Pour les De'linquantsMineurs, 34 QUEEN'S L.J. 719).*

[68] Lucia H. Seyfarth, Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation, (2013)*(14 chi.-kent j. Int'l & comp. L. 117, 124)*

ambiguity. A young girl forcibly conscripted by the Armed Forces Revolutionary Council (AFRC) witnessed soldiers cut her aunt's newborn baby in half and burn her house down. She was then taken to a camp and told to fight. She initially refused, but after being involved in AFRC operations for some time, she and other child combatants participated in the infamous invasion of Freetown and cut off people's arms, heads, and breasts.[69]

For many of these children, self- preservation can be mingled with an actual thirst for killing, and they can vacillate back and forth between shame and unspeakable violence.[70]Despite the atrocities committed by these children, the international legal consensus is that they are victims incapable of criminal culpability. In humanitarian accounts, child soldiers are either victims or demons, or, better yet, they are demons because they are victims. Neither demons nor victims are rational actors.[71] Certain children who join terrorist organizations experience a different type of confusion of categories as they may join voluntarily, yet many in the international community would see their choice as coerced simplydue to their age. In the past few months, a significant number of news articles have lamented the number of Western youth fleeing their homes to join ISIS.[72]What will happen when these teenagers are apprehended? Will they be prosecuted or seen as victims without any criminal responsibility? Their stories seem quite different from the experience of a child in Sierra Leone who was abducted and given an AK-47, yet laws have failed to recognize this difference.[73] The view of child soldiers primarily as, and maybe even only as, victims is reflected in the lack of international prosecution of child

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[69]Michelle Staggs, *Comment, Special Court Monitoring Program Update #45 Trial Chamber II - AFRC Trial Covering, Sierra Leone Trial Monitoring Program Weekly Report,*http://wcsc.berkeley.edu/wp-content/uploads/SL-Reports/045.pdf*accessed 2/7/2019*

[70] Cristina Martinez Squiers, How the Law Should View Voluntary Child Soldiers: Does Terrorism Pose a Different Dilemma?(2015) (*68 SMU L. Rev. 567)*https://scholar.smu.edu/smulr/vol68/iss2/9*accessed on 12/7/2019*

[71] David M. Rosen, Armies Of The Young: Child Soldiers In War And Terrorism 1 (2005)

[72]Terrence McCoy, How ISIS and other Jihadists Persuaded Thousands of Westerners to Fight their War of Extremism (2014), (*the Washington Post)*, <http:// www.washingtonpost.com/news/morning-mix/wp/2014/06/17/how-isis-persuaded-thou sands-of-westerners-to-fight-its-war-of-extremism/>*accessed 12/7/2018.*

[73]*Not every child who fought in Sierra Leone was abducted, but the war was "notably brutal" due to the pervasive kidnapping practices of rebel leaders. See DRUMBL, supra note 5, at 64*

soldiers for the crimes they have committed even though no international law forbids this type of prosecution. With one exception, international tribunals have not prosecuted child soldiers.[74] Furthermore, the only tribunal to explicitly address the age of criminal responsibility and possibility of prosecuting those under eighteen was the Special Court for Sierra Leone (SCSL), which was established after the bloody civil war that spanned over ten years and involved thousands of child soldiers.[75] The SCSL statute provides:

> The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.[76]

Even though the court had jurisdiction over those fifteen and older, international pressure led the Chief Prosecutor not to prosecute anyone under the age of eighteen.[77] International and national NGOs responsible for child-care and rehabilitation programs in Sierra Leone objected to any kind of judicial accountability for juveniles below eighteen years for fear that such a process would place at risk the entire reconciliation and rehabilitation program. The child soldiers were instead encouraged, but not forced, to participate in Truth and Reconciliation Commissions (TRC).[78]Several scholars have pointed out the paradox underlying this approach:

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[74]Cristina Martinez Squiers, How the Law Should View Voluntary Child Soldiers: Does Terrorism Pose a Different Dilemma?,(2015) *68 SMU L. Rev. 567*<https://scholar.smu.edu/smulr/vol68/iss2/9>*accessed 14/8/2018*

[75]Linda Van Brakel, Minding the Impunity Gap: Child Soldiers, International Law and Human Rights Policy(2013) *(unpublished L.L.M. Thesis, Utrecht University)*, <http://ssrn.com/abstract=2353009>*accessed 12/8/2019.*

[76]Statute of the Special Court for Sierra Leone, *U.N.-Sierra Leone, art.7(1), Jan. 16, 2002, 2178 U.N.T.S. 145, available at <http://www.rscsl.org/Documents/scsl-statute.pdf> accessed 12/8/2019*

[77] See Brakel, supra note 16, at 42.

[78]("The Truth and Reconciliation Commission (TRC) was established in 2000 to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict

child soldiers are on the one hand supposedly incapable of volunteering for military service, but on the other hand capable of volunteering to participate in TRC proceedings. One way to explain the hesitancy in prosecuting child soldiers in Sierra Leone was the brutal manner in which many of them were abducted, raped, and drugged into military service. Although there were voluntary fighters, the victim/perpetrator divide was murky and the devastation of the country extreme, so perhaps advocates of non-prosecution thought the best way for the country to move forward was to encourage the reconciliation of its fighting youth with the rest of the civilians through TRCs.[79]While Sierra Leone's criminal tribunal followed other international tribunals by not prosecuting child soldiers, the United States broke the pattern of non-prosecution after the September 11th terrorist attacks. The U.S. Military Commission at Guantanamo charged Mohammed Jawad and Omar Khadr with crimes committed in Afghanistan when they both were under the age of eighteen.[80] But these charges are definitely the exception and not the rule.[81] One possible explanation for the United States' decision is that the acts allegedly committed by Jawad and Khadr did not occur in the wake of a brutal civil war, but instead were attacks on American soldiers in a war between the United States and Afghanistan. Therefore, the appeal of a TRC, like the one in Sierra Leone, was non- existent as Jawad and Khadr had no need to reconcile with their fellow countrymen in an attempt to

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in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lome Peace Agreement; to address impunity, to respond to the needs of victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered.").

[79] Cristina Martinez Squiers, How the Law Should View Voluntary Child Soldiers: Does Terrorism Pose a Different Dilemma?, (2015) *68 SMU L. Rev. 567* <https://scholar.smu.edu/smulr/vol68/iss2/9>*accessed 12/8/2019*

[80]Associated Press, Guanta´namo Detainee Released, N.Y. TIMES (Aug. 24, 2009), <http://www.nytimes.com/2009/08/25/world/asia/25gitmo.html?ref=topics> accessed *12/8/2019 (Mohammed Jawad); Charlie Savage, Delays Keep Former Qaeda Child Soldier at Guantanamo. Despite Plea Deal, N.Y. TIMES (Mar. 24, 2012), http://www.nytimes.com/2012/03/25/us/delays-keep- omar-khadr-at-guantanamo-despite-plea-deal.html (Omar Khadr)*

[81] Other exceptions have also existed in domestic courts. The government of the Democratic Republic of Congo executed a fourteen-year-old child soldier in 2000. The Congolose Court of Military Order sentenced four child soldiers between the ages of four- teen and sixteen to death in 2001, but those sentences were not carried out. The Ugandan government charged two former Lord's Resistance Army fighters with treason when the child soldiers were fourteen and sixteen; these charges were later withdrawn. See Matthew Happold, Child Soldiers: Victims or Perpetrators?, 29 U. LA VERNE L. REV. 56, 71 (2008).

move a war-ravaged country forward. Those who have outspokenly opposed Khadr's prosecutions, and many have, have ignored the specific context in which the prosecutions occurred.[82]

2.2 Theoretical Framework

In the many conflicts around the globe today, children are either being forced to or coerced to fight; some volunteer for various reasons ranging from revenge, being a man, national pride, to that of survival. According to Goodwin-Gill and Cohn,[83] most young soldiers are not forced to join by blatant coercion but are skillfully manipulated by the recruiters, who use, religion, ethnic divides, their personal experiences and circumstances to make fighting with a gun the only sensible option.

> "Children's subjective reality is influenced by their social milieu or what has come to be called children's ecologies, and by developmental processes. The ecologies of children's lives - their parents, families, peer groups, school, religious communities and other community-based institutions - might exert pressures or send messages that lead to children's participation in hostilities. For example: relatives, family and friends are disappearing or have been tortured so revenge is foremost in the minds of these children. They have seen their family member or have themselves suffered abuse and humiliation at the hands of armed forces. All these factors result in a vulnerability to propaganda used by opposing sides in encouraging recruitment. Members of children's ecologies may also influence how a youth appraises the choice to participate in hostilities or not". [84]

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[82]Warped Justice, *N.Y. Times (Nov. 8, 2010), <http://www.nytimes.com/2010/ 11/09/opinion/09tue1.html (referring to Khadr's detention as a "disturbing case")> accessed 20/8/2019*

[83]Goodwin-Gill and Cohn, Child Soldiers: The Role of Children in Armed Conflicts (1994),*(Clarendon Press Oxford)*

[84]Ibid. page 30

The different developmental stages that a child goes through influences the child's understanding of "objective experiences" and these influences are responsible for a child responding in a specific manner i. e. in this case joining to fight. It is also important to remember that at this stage the youngster has the ability to "project a meaningful future for themselves and is also powerfully and intricately tied up with their role in the conflict".[85]Children often get involved in fighting when they begin to believe that this is an extreme situation and there is no solution in sight. A feeling of despair and frustration at nonexistent future prospects leads to physical involvement involving violence. Another basic reason may be that they are idle and have nothing constructive to do, as their schools are destroyed or have been closed down. Fields that they might work on are now dangerous as they have been made unsafe due to landmines.

2.3.1 Modeling Child and Coercive Recruitment Theory

This focuses on a rebel leader's marginal recruitment decision and the strategic interaction between the leader and the potential recruit, taking a principal-agent approach. Previously, civil war scholars tended to concentrate on the citizen's voluntary decision to fight, and the collective action problem therein: why do citizens engage in risky fighting when they could stand back and still enjoy the fruits of victory?[86]While crucial to our understanding of popular revolts, the approach has limitations: it does not help us explain forced recruitment. It focuses on the citizens' decision to participate but ignores their decision to exert effort and it does not address the leader's ability to choose recruits and incentivize performance. To model both illicit organizations and the recruitment of children, we extend and simplify two moral hazard models proposed by Chwe and Gates[87]Our motivation is simple: by understanding this strategic interaction, one can better plan counter action and predict the consequences of policy.

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[85]Ibid. pg 30-31
[86]Scott (1976) (Popkin *1979;Lichbach 1995;Wood 2003;and Humphreys and Weinstein 2008*)
[87]Chwe 1990;and Gates 2002

While economists have long studied coercion, slavery, and indentured labor, the strategic logic of coercion was largely ignored. Recently, however, researchers have applied principal-agent theory to understand coercive contracts. Feudal lords and slave-owners, for instance, may use their territorial and institutional control, and monopoly on violence, to reduce the reservation utilities of serfs and slaves their payoffs to escape, making it optimal to stay.

Likewise, Chwe examines child workers in England's Industrial Revolution. He notes that children were more likely to be beaten than adults, and asks under what circumstances contracts will employ pain as an incentive. Using a principal-agent model, Chwe shows that the optimal contract will provide money rather than pain when a worker's reservation utility is high; otherwise, those workers will run away. Children, who had poor outside options, would suffer punishment and still participate. These models have three drawbacks in the context of rebellion. First, they focus on how principals use punishment to lower the "outside" options of their agents, This simplification makes sense when the principals—industrialist, lord, or slave-owner—has the state on their side and can exert some control over the payoffs of agents that are not directly overseen by the principal's Illicit organizations, however, groups such as rebel groups seldom control territory or institutions, they have power only over incentives and expectations within the organization. Secondly, these models treat agents as fully rational and informed. This assumption may be reason able when modeling adults and employment, but we are hesitant to assume the same of children. Thirdly, these models do not allow for the difficulty or costliness of coercion to vary, as might occur through institutional and technological change, or through domestic and international advocacy and action. We develop a model that brings coercion into the "inside" option, so that violence is used as an incentive. We allow ability, ease of manipulation, and reservation utilities to vary by type, in this case, children and adults. We also include a parameter that represents the costliness of war crimes—in our case, the use

of coercion and punishment in recruitment—which could in principle vary across time and place.

2.3.2 Empirical Strategy

The theoretical framework hinges on several crucial assumptions, each with a relatively weak and anecdotal base of evidence. One is that child fighters are usually less able than adult fighters. A second is that children are more susceptible to manipulation. A third is that coercive recruitment varies with the costliness of punishment.

Data on labor coercion and child recruitment are rare, which is one reason why nearly all of the theoretical literature discussed here has remained theoretical, motivated mainly by historical narratives and cases. One of the few quantitative tudies shows that security forces in refugee camps diminish child recruitment, suggesting that rebel leaders respond to incentives, but leaves open why they sought children at all.[88]This article uses new data and three main empirical strategies to establish there as on ableness of these assumptions and the overall framework. First, we intensively study the case of one rebel group, the LRA, one of the most notorious child recruiters. We use dozens of interviews with former LRA recruits along with are presentative survey of survivors to examine leader motivations as well as recruitment, command, and control strategies. Second, we use the unusual nature of LRA forced recruitment a uniform, coercive strategy of abduction and violence imposed nearly at random to youth of different ages to assess the reasonableness of the "ease of manipulation" assumption at the center of the theory, as well as which forms of manipulation were especially effective and why. Our survey of LRA survivors collects self-reported measures of each of these mechanisms—belief in LRA ideology, disinformation received, and escape experiences—and compares responses by age of abduction. Finally, a handful of the model's predictions are cross-national, helping to predict what types of groups and environments will lead to child soldiering. At least

[88]Achvarina and Reich 2006

two determinants should vary across conflicts and groups: the cost of punishment, and reservation utilities for the average child and adult. We focus on the former, measuring the factors that influence cost of punishment across rebel groups, and look for correlations with child and coercive recruitment.

The International Criminal Court (ICC) opened its first trial in January 2009 for war crimes against children. The prosecutor's decision to hold the Court's very first trial on charges pertaining to the recruitment and use of child soldiers highlights the growing significance of children in international criminal justice.[89] The trial against the Congolese rebel leader, Thomas Lubanga Dyilo, sent the resounding message that those responsible for crimes against children can be held responsible before international tribunals.[90] Previously, international and mixed criminal jurisdictions (referred to in this research work as international courts)[91] have not always brought to the fore crimes committed against children or highlighted the victimization of children. The first international tribunals the Nuremberg and Tokyo international military

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[89]This chapter uses the terms "child soldier" and "child associated with armed forces or armed groups" interchangeably. The use of these terms is not meant to confer any legitimacy on these appalling crimes. GraçaMachel defines "child soldier" as "any child – boy or girl – under the age of 18, who is compulsorily, forcibly or voluntarily recruited or used in hostilities by armed forces, paramilitaries, civil defence units or other armed groups. Child soldiers are used for forced sexual services, as combatants, messengers, porters and cooks." (GraçaMachel, The Impact of War on Children: A Review of Progress Since the 1996 United Nations Report on the Impact of Armed Conflict on Children *(London: Hurst & Co., 2001)*

[90] Children and Transitional Justice; Truth-Telling, Accountability and Reconciliation, Edited by: SharanjeetParmar Mindy Jane RosemanSaudaminiSiegrist Theo Sowa, Human Rights Program Harvard Law School 1563(2010) (*Massachusetts Avenue Pound Hall 401 Cambridge, MA 02138 United States of America)*

[91]International or mixed courts include the permanent International Criminal Court (its statute, known as the Rome Statute, was adopted in July 1998 by 120 states and entered into force on 1 July 2002, triggering the temporal jurisdiction of the ICC, which is competent for grave international crimes committed in the territory or by nationals of States parties or which may otherwise be referred to the ICC by the United Nations Security Council); the International Criminal Tribunals for the former Yugoslavia (established respectively by United Nations Security Council Resolutions 808 [1993] and 827 [1993]) and for Rwanda (created by United Nations Security Council Resolution 955 [1994]); the Special Court for Sierra Leone (set up by an agreement between the Government of Sierra Leone and the United Nations further to Security Council 1315 [2000]); the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (created jointly by the Government of Cambodia and the United Nations); the Special Panels of the Dili District Court (created in 2000 by the United Nations Transitional Administration in Timor-Leste); the War Crimes Chamber in the Court of Bosnia and Herzegovina (integrated into the domestic Bosnian legal system); the International Military Tribunal of Nuremberg (established by the London Charter of 8 August 1945); and the International Military Tribunal for the Far East (Tokyo Tribunal, established by the Charter of the International Military Tribunal for the Far East proclaimed on 19 January 1946). All these international courts have mandates to try individuals responsible for grave crimes; their competence usually encompasses the three most serious international crimes: genocide, crimes against humanity and war crimes.

tribunals, did not pay particular attention to crimes against children, mentioning them only as part of broader crimes against civilians during the Second World War. Decades later, it was only with the adoption of the Convention on the Rights of the Child (CRC) in 1989 and the seminal 1996 report by GraçaMachel on the impact of armed conflict on children[92] that the specific plight of children in the context of mass or systematic crimes began to capture international attention. The subsequent establishments of the International Criminal Court (ICC) and the Special Court for Sierra Leone (SCSL) have triggered major developments regarding the sanctioning of crimes against children. Children are among the victims of genocide, crimes against humanity and war crimes, and they are affected in many different ways, both physically and psychologically.

This research aims to determine the extent to which international courts have focused on such international crimes committed against children and also sometimes by children. The topic assesses the contribution of international courts in trying those who recruit and use child soldiers, highlights the need to consider other crimes committed against children and reviews the exclusion of children from the scope of international prosecutions. It emphasizes that while international courts have contributed to the understanding of how children have been victimized, much more remains to be done. The current focus on the recruitment and use of children associated with armed forces or groups should not detract from accountability for other crimes against children or from other child victims.

Time and again, children are victims of genocide, enslavement, rape, exploitation and other grave crimes falling within the mandate of international courts. While these courts cannot prosecute each of these crimes, they can and should contribute to identifying the systematic, widespread or endemic patterns of criminality exploiting children during wars and also in times

[92]GraçaMachel, Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children, (1999) (*A/51/306, 26 August*)

of peace. The research work concludes by identifying areas needing improvement to better protect children, arguing notably that more thinking is required concerning the liability of children who have participated in the commission of crimes. It posits that children who have participated in international crimes should be considered first and foremost as victims, especially when the circumstances surrounding these crimes are inherently coercive, which in practice often seems to be the case.

2.3 Review of Previous Work

Several materials were consulted in the course of this research. An assortment of factors contributes to the significant number of children in combat. The issue can be analyzed from two standpoints. First, from the standpoint of a recruiter, concentrating on why children are preferred during armed conflict. Secondly, from the standpoint of children specifically, an examination of the reasons why youths join armed forces and their suitability. Traditionally, international conflicts blur the lines between non-combatants and combatants, and minors are increasingly discovering themselves in war zones and entering directly into armed conflict. Military recruiters in war-torn regions employ various tactics in order to obtain child soldiers. Traditionally, force is the tool of choice. Any choice that a child may have regarding armed conflict is eliminated when they are involuntarily recruited. Military units will habitually snatch children right off the street, or anywhere they can be found.[93]

On the other hand, while a majority of children are forced into military service, some enter voluntarily. However, it is debatable how any child in these situations could make a 'voluntary' choice. Scholars cite panoply of reasons that children join the armed forces. Often, countries devastated by warfare have seen the basic functions of society broken down. As a result, Ilene Cohn argues that child soldiers enlist 'to survive, to seek vengeance, to protect their families,

[93] Justin Coleman, 'Showing its Teeth: The International Criminal Court takes on Child Conscription in the Congo, but is its bark worse than its bite?' (2008) *(26 Penn State International Law Review 765, 766).*

to emulate their peers, to forge their identities as warriors or heroes, to overcome feelings of helplessness, or for lack of a better alternative.[94] Whatever the case may be, the practice of using children in armed conflict is one that must be discouraged hence the prohibition of same by an array of Laws. Authors in this aspect of the law have indeed made effort, portraying Instruments like the United Nations Convention on the Rights of a Child and others as mechanisms for the prevention of the menace in order to enlighten members of the public on the need to comply with the Laws. That notwithstanding, full compliance with the law by either a state party or an organized armed group is still farfetched. This research work intends to address these challenges. In view of that, the researcher reviewed some work authored by renowned scholars in this field of study as follows:

Julie McBride[95] is of the opinion that recruitment of child soldiers is prevalent, and highly topical, issue and the practice of recruiting children for use as soldiers is an evolving addition to the corpus of war crimes in international criminal law. The research provided a critical analysis of how the international justice institution namely the Special Court for Sierra Leone (Special Court) and the International Criminal Court (ICC) have dealt with the challenges of developing this new crime, while also giving effect to the intention of the criminal prohibition: to punish those who recruit children as soldiers, and thus increase the protection afforded to children in armed conflicts. It is her view that a number of key challenges can be identified that will guide the chronological examination of the war crime from human rights principle to prosecution at the Special Court and at the ICC. They are (i) identifying the *mensrea* and *actusreus* of the crime; (ii) establishing the appropriate modes of liability and the ambit of the defense of mistake and (iii) accounting for cultural considerations, including the question of prosecuting child soldiers. According to her, The Statute of the Special Court for Sierra Leone

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[94]Ilene Cohn, 'The Protection of Children and the Quest for Truth and Justice in Sierra Leone' (2001) *(55(1) Journal of International Affairs 35, 55.)*

[95]T. M. Casser The War Crime of Child Soldier Recruitment (2014*) <www.asserpress.nl produced and distributed for t.m.c.asser press by springerverlag berlin Heidelberg> accessed 20/8/2019*

and the Rome Statute have taken divergent paths on the issue of prosecuting child soldiers, with the Rome Statute choosing to restrict jurisdiction to those over the age of 18. However, conscious of the vast numbers of child soldiers that played a role in the civil war in Sierra Leone, the decision was made by the drafters of the Special Court's Statute to extend jurisdiction to cover persons aged between 15 and 18. It is argued that the approach taken by the Special Court on this issue is preferable, for a number of reasons. First, it sets 15-years old as the clear demarcation between 'child' and 'adult' that is missing in the Rome Statute, where a child is less than 15, but a legally responsible adult is over 18. Second, should a child ever have been the subject of a trial by the Special Court, any 'punishment' would have been construed in terms of rehabilitation and reintegration. It is argued that the Rome Statute should have taken this approach. In any event, as the ICC aims to prosecute only those 'most responsible' for atrocities, it is unlikely that children will ever be the subject of an ICC warrant, yet instigating an age limit of 15 prevents the scenario whereby those aged between 15 and 18 are 'legally untouchable' for any crimes they commit. She maintained that the current regime has the effect of placing those aged between 15 and 18 at additional risk of recruitment, as they can be targeted for the toughest assignments by their recruiters, and neither the recruiters nor the children risk ICC prosecution.

The unbiased work will be very useful to this research because it addresses the issues this work aims to put forward. The only limitation is that the work focuses mainly on the sierra Leon jurisdiction. This work aims to give the topic a more holistic approach.

MagneFrostad[96]provided an overview of the prohibition on recruitment and use of child soldiers, as well as indicating and assessing clarifications offered by relevant international case law in 2012. The article addressed some preliminary issues such as extraterritoriality, before

[96] Child Soldiers: Recruitment, Use and Punishment(2013) (*International Family Law, Policy and Practice Vol. 1. page 71)*

considering the illegality of employing children within state or non-state armed forces/groups, their treatment should they fall into the hands of another armed force/group, the prosecution of those who recruit or use child soldiers, and the prosecution of child soldiers for violations of international criminal law during the course of the conflict. The scholar considered the relationship of international human rights law to the law of armed conflicts, where he opined that the provisions of Laws of Armed Conflicts naturally apply to armed conflicts, but some of them – like the prohibition on recruiting children into armed forces in AP I Art. 77(2) – would also seem to apply in peace time. As regards the applications of international human rights law to instances of armed conflicts, he is of the view that they will also apply there, to the extent that states have not validly derogated from them or Laws of Armed Conflicts has modified them through the *lexspecialis* principle. The main differences between these disciplines are their age limits on recruitment and use, and their rules regarding the treatment of detained child soldiers.

The detailed work will enrich this research immensely mainly because it dissected the Laws prohibiting the use of children in armed conflicts and the punishment for violation of same. The work is recent so it encapsulates topical issues which are enlightening in this field that is ever evolving.

Cristina Martinez Squiers[97] addresses the menace of child soldiering from the angle of recruitment by non-state agents, such as terrorists. She opined that While a categorical approach that excuses all criminal responsibility for children who engage in conflicts, like every categorical rule, is easily applied, a more nuanced look at the issue of why child soldiers fight would better achieve justice. Despite what the international discourse about child soldiers has become, children both are coerced into and volunteer to join armed groups. However, the

[97] How the Law Should View Voluntary Child Soldiers: Does Terrorism Pose a Different Dilemma. ibid

international community has erased this distinction for purposes of criminal accountability: although prosecuting child soldiers is certainly not unlawful, such prosecutions increasingly are seen as inappropriate and, even, illegitimate, she posits. She maintained that in order to pursue justice in the midst of, and in the wake of, armed conflicts, the "legal fiction" that assumes all child soldiers are alike must be addressed. The question of criminal responsibility for child soldiers has particular salience regarding the War on Terror and the emerging threat of extremist groups, such as ISIS, who are actively recruiting juveniles.[98]While not all child terrorists are fighting voluntarily, the unique ideology that attracts youth to volunteer to join terrorist organizations and the transnational nature of terrorism implicate different notions of justice and criminal responsibility, while also raising important questions about which courts, domestic or international, are best suited to prosecute crimes related to terrorism. Concerns were raised by the author on how to prosecute voluntary child terrorists as terrorist groups expanding conquests include recruiting many Western teenagers under the age of eighteen. What will happen if these teenagers are apprehended? Will they be categorized as victims and receive prosecutorial immunity? Very little scholarship has discussed the difference between the prototypical child soldier and child soldiers involved in terrorism. Even scholars who have said child soldiers have the capacity to fight voluntarily have failed to account for the differences between child soldiers in civil wars, such as the internal armed conflict in Sierra Leone, and child soldiers joining terrorist organizations.

This literature will be helpful to this research because it strives to highlight the differences between the prototypical child soldier and child soldiers used by non-stategroups, it however

[98]Gul Tuysuz and Ivan Watson, *Missing UK girls believed to be in Syria, police say, CNN (Feb. 24, 2015, 8:30 PM), <http://www.cnn.com/2015/02/24/europe/turkey- uk-missing-girls> accessed 20/9/2019.* The use of the word "terrorism" and "terror" in this Comment refers specifically to the efforts of radical Muslim groups such as ISIS, Boko Haram, and Al- Qaeda.

leaves some questions unanswered as to how these categories of child soldiers may be made a thing of the past.

Iulia Kononenko[99] is of the view that the evolution of international instruments which address the phenomenon of child soldiers demonstrates the international legal community's endeavour to delineate childhood as a violence- free space, in need of special protection. The article explored the development of international legal thought and responses to the problem of child soldiers and addressed the research question: has the prohibition regime on child soldiers achieved the status of international customary law? The article considered the development of legal responses within two domains of international law – International Humanitarian Law and International Human Rights Law in light of the broader debate on the definition of childhood. This article outlined contested elements of the norms and legal documents and argued that though some key elements of the prohibition regime have attained the status of international customary law; there is need to develop the international legal framework further and ensure a clear definition of the beneficiaries of the law.

In the book "Children and Armed Conflict; A guide to International Humanitarian and Human Rights Law",[100] it is stated that armed conflict is an enduring global plague, displacing an increasing number of people within their countries and across borders. If armed conflict is a political act, quantifying and analyzing it should be political as well. Many of the tools used to measure the impact of conflict (such as body counts and battlefield injuries) were established under a traditional notion of war – that wars occur between States. Given the major changes in the nature of armed conflict, these tools are no longer as relevant, nor as accurate for measurement. That said, the Center for International Development and Conflict Management,

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[99] Prohibiting the Use of Child Soldiers: Contested Norm in Contemporary Human Rights Discourse,(2016)(*Nordic Journal of Human Rights vol. 34, no. 2, 89–103 http://dx.doi.org/10.1080/18918131.2016.1200293)*

[100]International Bureau for Children's Rights, (2010)(*2715 chemin Côte-Sainte-Catherine, Montreal (Quebec) H3T 1B6 (514) 932-7656 (514) 932-9453)*

one of the most reputable organisations working in this field, puts the number of armed conflicts worldwide in 2008 at 26, many of which were long-standing grievances and recurrences of previous wars.[101]Over the last ten years, there have been numerous additions to the body of international humanitarian and human rights law aimed at protecting the rights of children living in situations of armed conflict. Yet, practitioners, actors and governments are often unaware of the breadth of these new instruments and their methods of application and implementation. Usually, their focus is on raising awareness of the UN Convention on the Rights of the Child, the tool most widely utilized and understood by actors in the field. In the specific context of armed conflict, there is the potential for greater advocacy, awareness raising, monitoring and reporting on a wide range of commitments and norms. Due to the lack of knowledge about the legal framework for protection of children in armed conflict, as well as the tools for its implementation at the national level, many actors in the field fail to integrate new laws, resolutions and policies into their daily activities to ensure child protection. The impact of actors' work in the field can be maximized through capacity building and information sharing on these new developments. The International Bureau for Children's Rights published the Guide, in collaboration with the Children and Armed Conflict Unit of Essex University, to elaborate the international humanitarian and human rights law related to children in armed conflict.

The book is a comprehensive analysis of data relating to child soldiers. The researcher aims to as much as possible tackle the topic holistically, so this book will enrich the research immeasurably because it addresses the political aspect of the topic.

[101] International Bureau for Children's Rights (IBCR)

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORK AGAINST THE USE OF CHILDREN IN ARMED CONFLICT

3.1 Legal Framework against the Use of Children in Armed Conflict

The International laws will be discussed, after which the regional and domestic laws will follow in quick succession.

3.1.1 International Conventions

Until 1977 there were no laws directly addressing child soldiers, but as public awareness of the use of child soldiers has expanded, so has the body of law.[102] In 1977, Additional Protocols were added to the Geneva Convention, which set the minimum age for the recruitment of children in armed conflicts at fifteen.[103] The Protocols also instructed that "the Parties to a conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities."[104] In 1989, the United Nations Convention on the Rights of the Child (CRC) articulated a similar rule, asking countries to refrain from recruiting children under the age of fifteen in armed conflicts, even though the CRC generally defined a child as anyone under the age of eighteen.[105] In 2000, the United Nations adopted the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (Optional Protocol), which was ratified by the United States in 2002, and increased the age of recruitment of child soldiers to eighteen.[106] Under the Optional Protocol, All recruitment of child soldiers by non-State armed groups is presumed to be involuntary,

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[102] Steven Freeland, Mere Children or Weapons of War - Child Soldiers and International Law(2008). (*29 U. La verne l. Rev. 19, 3).*
[103]Ibid at 32
[104]Protocol Additional to the Geneva Conventions of Aug. 12 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art.1(1), June 8, 1977, 1125 U.N.T.S. 609.
[105] Freeland, supra note 34, at 27.
[106]Ibid at 35

and thus illegal.[107] The Optional Protocol encourages State Parties[108] to "take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities."[109] Since 2000, many countries, have taken efforts to prevent the forced recruitment of child soldiers and help rehabilitate child soldiers back into society.[110] Despite the laudable efforts made by countries to combat the disturbing issue of child soldiers, the applicable laws fail to distinguish between voluntary and involuntary recruitment and incorrectly presume that any recruitment under the age of eighteen is involuntary, encouraging impunity for every child soldier.[111]

Traditionally, a child's function in combat was that of 'innocent bystander.[112] However, in the aftermath of the Second World War, the nature of armed conflict underwent a tremendous shift. Intrastate conflicts of insurgence, often taking the form of guerrilla warfare, were commonly being conducted against colonial, authoritarian or totalitarian regimes.[113] Adolescents partook in these conflicts in growing numbers and, as a result, two Additional Protocols to the Geneva Conventions (AP I and AP II), adopted in 1977, recognised children as potential combatants for the first time in inter- national law.

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[107]Grantland Lyons, Comment, Separate but Equal Accountability: The Case of Omar Khadr,(2013)*(3 u. Miami nat'l sec. & armed conflict l. Rev. 125, 137–38)* (quoting Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Annex I, art. 4, G.A. Res. 54/263, U.N. Doc. A/RES/54/49 (May 25, 2000)).

[108] "A 'State party' to a treaty is a country that has ratified or acceded to that particular treaty, and is therefore legally bound by the provisions in the instrument. *Introduction to the Convention on the Rights of the Child: Definition of key terms*, UNICEF, *<http:// www.unicef.org/crc/files/Definitions.pdf> accessed 25/9/2019.*

[109]Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Annex I, art.1, G.A. Res. 54/263, U.N. Doc. A/RES/ 54/49 *(May 25, 2000)*

[110]Grantland Lyons, Comment, Separate but Equal Accountability: The Case of Omar Khadr, 3 U. Miami national sec. & armed conflict l. Rev. 125, 137–38 (2013) *(quoting Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict Annex I, art. 4, G.A. Res. 54/263, U.N. Doc. A/RES/54/49 (May 25, 2000)).*

[111]DRUMBL, supra note 5, at 45 (quoting the clinical psychologist who testified in Lubanga that a child can never be considered psychologically to have voluntarily joined an armed group because if they could "we wouldn't have a law that makes you 18 to become an adult").

[112] Lisa Hughes, Can International Law Protect Child Soldiers? (2000) *12(3) Peace Review 399, 402.*

[113] ibid

3.1.1.1 The Additional Protocols to the Geneva Conventions

Initial condemnations of the practice of child soldiers can be found in both AP I and AP II. While the original Geneva Conventions regarded children as individuals needing special protection,[114] the ensuing Additional Protocols considerably transformed, or conceivably restructured, the concept of a child's needs. Article 77(2) of AP I holds:

"The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest."

While article 77 intends to provide protection for children, the question of whether it offers sufficient protection must be raised. First, the specified minimum age for conscription is 15 and not 18 regardless that preference is to be given to the oldest child when recruiting. Another impediment is that children are only safeguarded when 'feasible'. To this end, often, most children fall under the cracks and are left unprotected by the legal system.[115] Moreover, the protection of children only applies when they are non-combatants and are consequently not involved in the conflict. As such, the API fails to contemplate the likelihood of children below the age of 15 taking part in the battle without being used as direct participants;[116] a custom commonplace in numerous states.

Article 4(3) of AP II, which only applies to conflicts of a non-international nature defines safeguards for children in conflict. Under article 4(3)(c), 'children [under 15] shall neither be

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[114] Protocol Additional to the Geneva Conventions of 12 August (1949), *and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, 1125 Unit 3 (entered into force 7 December 1978), art 77 (2), ('Protocol I').*

[115] sAndhyAnAir, Child Soldiers And International Criminal Law: Is The Existing Legal Framework Adequate To Prohibit The Use Of Children In Conflict? (2017) (*2 Perth International Law Journal 4)*

[116] ibid

recruited in the armed forces or groups nor allowed to take part in hostilities.[117]'Further, it holds:

"the special protection provided by this Article to children [under 15] shall remain applicable to them if they take direct part in hostilities despite the provisions of subparagraph (c) and are captured."[118]

Once more, there is a failure to increase the age threshold to 18. Nevertheless, in one regard, the interpretation in AP II is preferable to article 77 in AP I; the 'feasibility' provision is omitted. As such, all forms of participation, whether directly or indirectly, by children below the age of 15 in non-international conflicts is forbidden by this provision, unlike in AP I.

Human rights are the essential rights individuals should be afforded in relation to state authorities. As will be demonstrated in this section, the proscription of child soldiers is evident in the practices of international human rights law and equally in universal agreements and regional inter-state agreements. However, some murkiness still exists within existing legal frameworks that allow for manipulation and the continued trend of child soldiers.[119]

3.1.1.2 Convention on the Rights of the Child 1989

The CRC firmly opposes the recruitment of child soldiers. The quickest and most widespread ratification of a treaty in history,[120] it took less than a year to enter into force and won virtually universal recognition within a decade.[121] Given the apparent universality of the CRC, it would be acceptable to assume that the age of majority it recognised – 18 years – has achieved global status and that anyone under 18 qualifies as a child.[122]

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[117] Protocol Additional to the Geneva Conventions of 12 August (1949). and Relating to the Protections of Victims of Non-International Armed Conflicts, opened for signature 12 December 1977, 1125 Unit 609 (entered into force 7 December 1978, art 4(3) ('Protocol II').

[118]UN Additional Protocol II, art 4(3)(d)

[119]AndhyAnAir, Child Soldiers And International Criminal Law: Is The Existing Legal Framework Adequate To Prohibit The Use Of Children In Conflict? (2017) (*2 Perth International Law Journal 40)*

[120]Peter Warren Stringer, Children at War (2006) *(University of California Pres 141).*

[121] Timothy Webster, Babes with Arms: International Law and Child Soldiers' (2007) *(39(2) The George Washington International Law Review 227, 227)*

[122] ibid

The CRC, nonetheless, espouses a more flexible methodology to age with regards to child soldiery. Article 38(2) of the CRC holds that all ratifying states must take 'all feasible measures'[123] to ensure that youths below the age of 15 do not take direct part in armed conflicts. The language is similar to that of AP I to the Geneva Convention but the CRC takes the additional step of requiring all ratifying states to do everything feasible to deter children from partaking in armed conflicts. Under article 38(3), states are additionally forbidden from drafting children below the age of 15 and, as in AP I, necessitates states to preference the enlistment of older children when choosing between 15 to 18 year olds.[124] While the level of commitment in the CRC largely echoes AP I, the provisions guarding child soldiers in the CRC were the fruit of protracted negotiations by its drafters. Even the basic definitional material of in article 38(1) was strongly contested.

For instance, the United States (US) representative objected to the inclusion of 'to them' after the word 'applicable' as the US did not want to be bound by conventions to which it was not a party.[125]

3.1.1.3 Rome Statute

For the most part, the Rome Statute establishing the ICC signified progress in the International legal protection of children. The treaty introduced important protective measures for children in armed conflict, including: labelling intentional attacks on educational institutions as war crimes, affording special provisions for children as victims and witnesses, and excusing children below the age of 18 from prosecution by the court.[126] Most prominently, the recruitment of youths under the age of 15 into armed units or national armed forces is

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[123]CRC, art 38(2).

[124] Jordan A. Gilbertson, Little Girls Lost: Can the International Community Protect Child Soldiers' (2008) *(29(1) University of La Verne Law Review 219, 229.)*

[125] Sharon Detrick, A Commentary on the United Nations Convention on the Rights of the Child *(BRIII, 1999) 650.*

[126]Human Rights Watch, Promises Broken: An Assessment of Children's Rights on the 10th Anniversary of the Convention on the Rights of the Child (1999) *Human Rights Watch https://www.hrw.org/legacy/press/1999/nov/children.htm> accessed 25/10/2019*

recognised as a war crime.[127] The Rome Statute prohibits both 'conscripting and enlisting children under the age of fifteen'[128] and 'using them to participate actively in hostilities.'[129] While this wording is drawn mainly from the CRC and AP I,[130] the Rome Statute nonetheless improves the protections afforded to children in one important respect. The inclusion of the expression 'conscripting or enlisting' implies that both actively recruiting children and passively allowing them to enlist are prohibited.[131]

Despite these improvements to the legal framework, critics still assert that the Rome Statute did not go far enough. Various non-governmental organisations such as Human Rights Watch have voiced displeasure that the age limit was established at 15 and not 18 as suggested.[132] Critics have additionally voiced discontent with the ambiguity of the phrase 'participating actively in hostilities.'[133] Confusion arose surrounding the expression's applicability to purely direct participation as well as activities associated with combat developed. As such, an argument can be made that the Rome Statute should have been more precise in its prohibition of actions to ensure adequate protection for children in armed conflict.

It has been established that, under customary international law, the recruitment and use of children in armed conflict is a war crime.[134] This is significant for two reasons. First, it conveys a symbolic message that could serve as a warning to anyone in violation of these customary international laws that they will be indicted and imprisoned.[135]

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[127]AndhyAnAir, Child Soldiers And International Criminal Law: Is The Existing Legal Framework Adequate To Prohibit The Use Of Children In Conflict? (2017) (*2 Perth International Law Journal 40)*

[128] Rome Statute, art 8(2)(b).

[129] Ibid art 8(2)(e).

[130] William Schabas, An Introduction to the International Criminal Court (2007) *(Cambridge, 3rd ed, 50)*

[131] Human Rights Watch, Child Soldiers (1999) *Human Rights Watch <https://www.hrw.org/legacy/wr2k/ Issues-02.htm> accessed 21/8/2019*

[132]AndhyAnAir, Child Soldiers And International Criminal Law: Is The Existing Legal Framework Adequate To Prohibit The Use Of Children In Conflict? (2017) *(2 Perth International Law Journal 40)*

[133] Human Rights Watch, Child Soldiers (1999) *Human Rights Watch <https://www.hrw.org/legacy/wr2k/ Issues-02.htm> accessed 25/10/2019*

[134]David J Francis, Paper Protection Mechanisms: Child Soldiers and the International Protection of Children in Africa's Conflict Zones' (2007) *(45(2) The Journal of Modern Africa Studies 207, 210.)*

[135]AndhyAnAir, Child Soldiers And International Criminal Law: Is The Existing Legal Framework Adequate To Prohibit The Use Of Children In Conflict? (2017) *(2 Perth International Law Journal 40)*

Secondly, it encourages an end to 'the culture of impunity of recruitment and use of child soldiers.'[136] However, in order to guarantee that all children embroiled in conflict are equally protected, international legal mechanisms must have consistent definitions and provisions. At present, it is evident that this is not the case. Most statutes, conventions and treaties encompass their own individual definitions of child soldiers with regard to age parameters and the duties a child has to execute in order to be shielded under the relevant 'child' provisions. Consequently, a uniform definition of 'child soldier' is vital to provide equal protection to children in armed conflict.

Antonio Cassese proposes four reasons as to why states have shied away from prosecuting international war crimes. First, many states have not successfully passed the laws required to enforce appropriately sanctioned international treaties. Secondly, several nations enter reservations when ratifying certain international treaties. As a result of these reservations the ratified international treaty holds no concrete legal efficacy. Thirdly, certain states have shirked their international responsibilities by implementing laws that limit or reduce the extent of jurisdiction delineated in international treaties. Lastly, 'national courts have developed in their judicial practice a restrictive tendency to limit as much as possible the impact of international rules or the exercise of jurisdiction by national courts over international crimes.'[137]

3.1.2African Charter on the Rights and Welfare of the Child

The 1990 African Charter on the Rights and Welfare of the Child (ACRWC)[138] is the only regional mechanism that addresses the issue of child soldiers.[139] Under article 22, ratifying states are required to '...take all necessary measures to ensure that no child takes a direct part in hostilities and refrain...from recruiting any child.' Indeed, the wording of the ACRWC is

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[136] ibid

[137] Antonio Cassese, International Criminal Law(2003)*(Oxford University Press 301).*

[138] African Charter on the Rights and Welfare of the Child (1990), (*CAB/leG 24.9/49 (entered into force 29 November 1999)*

[139] Steven Freeland, Child Soldiers and International Crimes – Should International law Be Applied?' (2005) *(3(2) New Zealand Journal of Public and International Criminal Law 303, 308).*

clearer than that in the CRC as it requires ratifying states to 'take all necessary measures' and additionally establishes a higher age threshold for enlistment and involvement, at the age of 18. Yet, as was the case with other legal instruments, the ACRWC fails in shielding the children who are already part of armed forces but not actively involved in hostilities. Moreover, the ACRWC displays another shortcoming in that it is not applicable to intrastate rebel and insurgent units, which are the groups liable for the majority of the use of child soldiers.[140]

The ACRWC contributes to the prohibition of the use of children in armed conflict as it explicitly protects children involved in armed conflicts.[141] While only regional, it is important for several reasons. First, it recognises that the rights and welfare of the child are more important than the form of conflict in which the child participates.[142] Next, the way in which a child is defined is not significant. The Charter establishes a child as anyone under the age of 18 consequently advancing existing international criminal protections for youths.[143] Finally, the ACRWC asserts that 'parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting a child.'[144]

The ACRWC is broader than the CRC and, while acting as a supplement to the CRC, also tries to remedy some of the flaws within the CRC. Notwithstanding all its advantages there remain limitations. The ACRWC has only just become binding on the African states that have signed and ratified it. In addition, while the states that did sign it may be bound, numerous others that have not signed nor ratified it remain unaffected. Moreover, article 1(3) states that 'any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations

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[140] Jordan A. Gilbertson, 'Little Girls Lost: Can the International Community Protect Child Soldiers' (2008) *(29(1) University of La Verne Law Review 219, 229).*

[141] Bhavani Fonseka, The Protection of Child Soldiers in International Law' (2001) *(2(2) Asia-Pacific Journal on Human Rights and Law 83, 83).*

[142] ACRWC, Article 22(3).

[143] Ibid art 2.

[144] Ibid art 22(2)

contained in the present Charter shall to the extent of such inconsistency be null and void.'[145] Therefore, cultural and religious inconsistencies with the African Charter significantly raise the likelihood for non-compliance with the ACRWC. Within Africa, different regions vary significantly in their religious beliefs, social systems, and economic organisation. These factors make it impossible for states and even communities within a single state, to have a common conception and understanding of the normative prescriptions set out by ACRWC.[146] Until this is rectified, murkiness remains in the current existing legal system ensuring inadequate protections vis-à-vis children in armed conflict.

To that end, another shortcoming relating to the protection of child soldiers is that most states in Africa, where the majority of the child soldiering occurs, find it difficult to integrate international treaties into their municipal legislation. It is traditionally expected that when states ratify international agreements, they consent to maintain certain 'fundamental rights and protection of children.'[147] However, the enforcement of these mechanisms has not led to implementation within state jurisdiction.[148] This fosters a contentious debate on the correlation between international and domestic law.[149] This debate raises numerous supplementary trepidations; for instance, effectiveness of international customary law in willing states to indict international crimes. To that end, several treaties provide grounds for jurisdiction over international crimes.[150] It is also recognised that every state has jurisdiction in international law to indict war crimes. The main issue is the unwillingness of states to utilise that influence. As a result, despite numerous treaties which recognise states' jurisdiction and indeed responsibility

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[145]Sandhya Nair, Child Soldiers And International Criminal Law: Is The Existing Legal Framework Adequate To Prohibit The Use Of Children In Conflict? (2017) *(2 Perth International Law Journal 40)*

[146]Thoko Kaime, 'The Foundations of Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (2009) *(3(1) African Journal of Legal Studies 120, 133)*

[147]David J Francis, Paper Protection Mechanisms: Child Soldiers and the International Protection of Children in Africa's Conflict Zones' (2007) *(45(2) The Journal of Modern Africa Studies 207, 210.)*

[148] ibid

[149] ibid

[150] ibid

to prosecute war crimes, few states have in fact prosecuted individuals for the recruitment or employment of child soldiers.[151]

3.1.3 Child Rights Act 2003

In Nigeria, a number of Laws prohibit the abuse of children, but the Child Rights Act is mentioned because it specifically mentions children and arms bearing. S. 26[152]provides that "No person shall employ, use or involve a child in any activity involving or leading to the commission of any other offence not already specified in this Part of the Act. (2) A person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to imprisonment for a term of fourteen years."

S. 34[153] specifically provides (1) No child shall be recruited into any of the branches of the armed forces of the Federal Republic of Nigeria. (2) The Government or any other relevant agency or body shall ensure that no child is directly involved in any military operation or hostilities.

The militant group Boko Haram continues to recruit children and use them in battlefields across Nigeria, Cameroon, Niger and Chad, experts say. While it has suffered major military losses in the Lake Chad Basin, the extremist group seems to be adopting new strategies to revive its influence in the region, according to the experts. Officials with the Multinational Joint Task Force (MNJTF), a regional military alliance fighting the Boko Haram insurgency, say one strategy of the group is to step up child recruitment. Information on this disturbing development was brought in by human intelligence sources and corroborated by concerned individuals and groups, Boko Haram terrorists themselves further confirmed the atrocious acts when they

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[151] AndhyAnAir, Child Soldiers And International Criminal Law: Is The Existing Legal Framework Adequate To Prohibit The Use Of Children In Conflict? (2017) *(2 Perth International Law Journal 40)*

[152] CRA (2003)

[153] ibid

posted pictures of children dressed in military fatigues and holding assault rifles in a video released during a celebration of the Muslim holiday Eid al-Adha,[154]

Boko Haram has long engaged in mass abduction of schoolgirls, sexual enslavement of women and the mass murder of innocent civilians.

In July[155], the United Nations Special Representative for Children and Armed Conflict presented a report to the U.N. Security Council in which it described gruesome violations against children in Nigeria's northeast, Boko Haram's main stronghold, and other countries where the militant group has an active presence. The children of Nigeria and neighboring countries continued to endure horrendous violations by Boko Haram, and the expansion of the group's activities across the Lake Chad Basin region is a serious concern for the secretary-general, said Virginia Gamba, the special representative of the secretary-general for children and armed conflict.[156]

According to the report, which documented violations between January 2017 and December 2019, the recruitment and use of children accounted for the greatest number of verified violations, with a total of 3,601 boys and girls affected. Boko Haram was responsible for the recruitment and use of 1,385 children, mainly through abduction, used in direct combat and other support roles, including as sexual slaves, the report said.[157]

Although the 1999 constitution prohibits the creation of security forces other than the armed forces and federal police service, armed vigilante groups operated in a number of states. The use of children by such groups was not extensively documented. However, under-18s were reported to be active in them, although most group members were aged 20 or older.[158]

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[154]<https://www.voanews.com/extremism-watch/experts-boko-haram-recruiting-children-soldiers-suicide-bombers#:~:text=The%20Nigerian%20military%20official%20added,Islamic%20caliphate%20based%20in%20Nigeria> *accessed 25/10/2019.*

[155] 2019

[156]*<https://www.voanews.com/extremism-watch/experts-boko-haram-recruiting-children-soldiers-suicide-bombers#:~:text=The%20Nigerian%20military%20official%20added,Islamic%20caliphate%20based%20in%20Nigeria.> accessed 25/10/2019*

[157] ibid

[158]*<https://www.refworld.org/docid/4988063bc.html> accessed 8/8/2019*

The high levels of violence used by such groups and the abusive use of such groups for political purposes by state authorities put pressure on the federal government to clamp down on them. In April 2002 the government presented a Prohibition of Certain Associations Bill to parliament, aimed at proscribing certain armed groups. However, it did not clearly define vigilante groups and left to presidential discretion the determination of which groups should be banned. The bill had not passed into law by March 2004[159]

The weakness or fragility of the Nigerian state is a factor in both motivating youth participation in and the proliferation of violent groups in the country. The lack of political will has resulted in the rise of youth-led vigilante groups throughout the country. These groups have moved beyond the function of providing street justice and neighbourhood security, instead reflecting religious, ethnic, and political dimensions of conflict.[160]The most notorious example of vigilantism in Nigeria is the Bakassi Boys, a primarily Igbo group in the south-eastern portion of the country. The group emerged in response to the rise of criminal gangs in the market city of Aba, but quickly grew to a popular movement reflecting undertone of Igbo-nationalism, traditional beliefs of supernaturalism, and political tensions as their activities devolved into political thuggery on behalf of political figures.

3.2 Institutional Framework Governing the Use of Children in Armed Conflict

In 2002, the International Criminal Court (ICC) became the first permanent international criminal tribunal to hear and decide cases involving genocide, crimes against humanity, and war crimes.[161] The Rome Statute of 1998 formed the International Criminal Court,[162] and the statute designates the way in which the ICC can prosecute international crimes.[163] Those involved in the drafting of the statute decided that criminal responsibility for crimes under the

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[159] *<https://www.refworld.org/docid/4988063bc.html> accessed 8/8/2019*

[160] *<https://www.sfcg.org/wp-content/uploads/2014/07/NGR_EV_Jul12_AnalysisOfTheSituation.pdf> accessed 9/8/2019*

[161] Freeland, supra note 34, at 42, 44.

[162] ROSEN, supra note 1, at 139.

[163] Freeland, supra note 34, at 42–44

subject matter jurisdiction of the court would begin at age eighteen.[164] The statute reads: "the Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[165] Even though the ICC does not have jurisdiction of anyone under the age of eighteen, the Rome Statute only makes the conscription of child soldiers under the age of fifteen a war crime.[166] This discrepancy and "gray zone" has left many wondering how the law should view child soldiers between the ages of fifteen and eighteen.[167] If they can be legally recruited, can they also be held accountable for the crimes they commit? Furthermore, the lack of jurisdiction, and therefore criminal responsibility, for those under eighteen is not, as many have claimed, a principle of the ICC and international law.[163] Instead, the drafters of the Rome Statute vigorously debated the appropriate age restrictions to the ICC's jurisdiction and ultimately chose eighteen.[169] While the ICC has continued to bring attention to the important issue of the illegal conscription of child soldiers,[170] due to its jurisdictional limit, it has failed to address the issue of voluntary child soldiers and how the law should view those between the ages of fifteen and eighteen. Another international law that has continued the discourse of victimization is the 2007 Paris Principles.[171] The Paris Principles state that juveniles accused of committing international crimes involving armed conflicts should be viewed primarily as victims of offenses against international law; not only as perpetrators."[172] Throughout these principles, there is no mention of ending impunity for atrocities committed by child soldiers, no matter their age or degree of voluntary participation.[173]Not only has

[164] See generally Ottotriffterer, ed.. Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 494 (1999).
[165]Rome Statute of the International Criminal Court, art.26, July 17, 1998.
[166]Rome Statute art. 8.
[167] ROSEN, supra note 1, at 142–45 (explaining the gray zone).
[168]HAPPOLD, supra note 7, at 6
[169]ibid
[170]Prosecutor v. Thomas Lubanga Dyilo, Supra.
[171]UNICEF Paris Principles: Principles and Guide- lines on Children Associated with Armed Forces or Armed Groups, (2007)
[172]Paris Principles, art. 3.6.
[173]Brakel, supra note 16, at 28.

international law repeatedly evaded the question of criminal responsibility for child soldiers, U.S. laws have also continued the discourse of victimization, but have done so without ignoring the issue of voluntariness.

In 2003, the Child's Rights Act was passed into law by the Federal Government of the Federal Republic of Nigeria. This Act is the product of the 1987 United Nations Convention on the Rights of the Child, as domesticated under section 12 of the 1999 Constitution of Federal Republic of Nigeria (as amended). Since the passage of this Act, most of the States in Nigeria have followed suit and enacted exact versions of it as their state laws. Four years into the enactment of the Act, Lagos State enacted its own Child's Rights Law 2007.

Prior to the enactment of the 2007 Law, there was no Family Court in Lagos State. Issues pertaining to the child were dealt with in the juvenile court, constituted by the Chief Judge of Lagos State under section 6 of the Children and Young Persons Law Cap. C10, Laws of Lagos State 2003. Family Court in Lagos State was first introduced and established under section 138 of the 2007 Law. The 2007 Law is, therefore, the origin of and the enabling law for the Family Court in Lagos State.

Other states such as Borno, Oyo, Taraba, Nassarawa and the Federal Capital Territory have all passed their Child Rights Laws and established Family Courts similar to those in Lagos State.

3.3 Case Law

In the event of an international armed conflict, children are protected by Geneva Convention IV[174]relative to the protection of civilians and by API. They are covered by the fundamental guarantees that these treaties provide, in particular the right to life, the prohibitions on coercion, corporal punishment, torture, collective punishment and reprisals[175]and by the rules of API on the conduct of hostilities, including both the principle that a distinction must be made between

[174] 1949

[175]Art. 27-34GCIV and Art. 75 API

civilians and combatants and the prohibition on attacks against civilians[176].In the event of non-international armed conflict, children are also covered by the fundamental guarantees for persons not taking direct part in the hostilities[177]They are further protected by the principle that the civilian population as such, as well as individual civilians, shall not be the object of attack.[178]

Non-compliance with the laid down rules have been litigated upon and an examination of these cases will aid a better understanding of the topic. Some of the cases are discussed in this chapter.

3.3.1 Special Court for Sierra Leone

Conflicts around the world have focused attention on the plight of children caught up in armed conflicts and it is tempting to assume as the Jesuit philosopher, Bernard Lonergan, once said about the Church, that international law arrives at the place of action a little late and somewhat out of breath. Hence, to protect children in armed conflicts, international law must be able to respond to the changing nature of wars and strife. In the past hundred years open warfare between sovereign States have, with notable exceptions, given way to internal armed conflicts often with covert support from outside the State. There has been a similar change in military strategy. Modern tactics seek to obscure the differences between those who fight and those who do not by camouflaging combatants within the overall population. In addition, there are increasing risks to children because many internal armed conflicts are perpetrated on a tribal or zonal basis with the result that any person outside that particular group is regarded as the enemy.[179] Consequently, the proportion of civilian casualties in armed conflicts has been rising.

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[176]Art. 48 and 51

[177]Art. 3common to the GC and Art. 4 APII

[178](Art. 13 APII

[179] Geraldine Van Bueren, The International Legal Protection Of Children In Armed Conflicts,*(International and Comparative Law Quarterly VOL. 43).*

In the First World War only, 5 per cent, approximately, of all casualties were civilian.[180] By the end of the Second World War this figure had arisen to approximately 50 per cent and continues to rise. Out of the 20 million killed in the 150 armed conflicts between 1945 and 1982, the majority of deaths were women and children.[181] In the past ten years alone internal armed conflicts have led to 1.5 million child deaths, 4 million children disabled as a result of war wounds and 5 million children living in refugee camps to escape conflicts.[182]

Important as these mechanisms may be, until they are enforced, not much can be done practically. Therefore, establishing state practice through temporary courts, such as the Special Court for Sierra Leone (SCSL), hold the answer to ensuring the prohibition of children in armed conflicts.

The Revolutionary united Front (RUF) was one of several armed rebel factions that fought the decade-long civil war in Sierra Leone. Notorious for the capture and use of child soldiers, the SCSL issued an indictment against the high-ranking officials of the RUF. This section analyses the development of the growing child soldier jurisprudence in Sierra Leone and plots the impact of the RUF trial towards international criminal law jurisprudence governing the prohibition of the use of children in armed conflict.

The civil war in Sierra Leone saw the conscription of 10 000 children into the state's three armed forces.[183] Thousands more were kidnapped and forced into sexual slavery, unwanted marriages, and domestic servitude.[184] Innumerable children in Sierra Leone were slaughtered; many who survived withstood brutal conditions and have been gravely traumatised by their

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[180] According to studies undertaken for the International Symposium on Children and War held in Finland in 1983, cited in UNICEF Dec. 1985 C/1, Annex 1. See also Kahnert, Pitt and Taipale (Eds), Children and War, Proceedings of Symposium at Siuntio Baths, Finland 1983, p.5

[181] Geraldin Van Bueren op cit

[182] In Bosnia and Herzegovina alone 1,000 children have died and 30,000 wounded: UNI- CEF figures presented to the Committee on the Rights of the Child (UN Doc.CRC/C/SR.38, Oct. 1992). At the time of writing no accurate information is available for Somalia.

[183] Noah B Novogrodsky, Litigating Child Recruitment before the Special Court for Sierra Leone (2006) *(7(2) San Diego International Law Journal 421, 423)*

[184] Ibid

experiences.[185] The recruitment of children is regularly accompanied by other grave domestic and international crimes, such as kidnapping, sexual assault, and slavery.[186] The rampant practice has been criticised. In resolution 1315, adopted by the UN Security Council in August 2000, the Security Council was deeply concerned with the egregious crimes being committed in Sierra Leone and requested the Secretary General to negotiate with the government of Sierra Leone to establish an independent Special Court.[187] The SCSL was founded cooperatively by the UN and the government of Sierra Leone.[188] It was mandated to try those 'bearing the greatest responsibility' for crimes committed in Sierra Leone following 30 November 1996.[189] In 2003, the Prosecutor of the SCSL issued 13 indictments, of which two have been withdrawn due to the deaths of the defendants.[190] Trials of two former leaders of Civil Defence Forces (CDF) and of three former Armed Revolutionary Forces leaders (AFRC) have been concluded (counting appeals).[191]

In terms of provisions, the Statute of the Special Court for Sierra Leone contains much of the same language as other international legal mechanisms governing the protection of children.[192] For instance, conscripting or enlisting children below the age of 15 years into armed forces or groups or using them to participate actively in hostilities is prohibited.[193] A further safeguard emerges from the distinction between the recruitment of children into armed units and their employment in active combat.[194]

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[185] Ibid 424
[186] ibid
[187] SC Res 1315, UN SCOR, 4186th meeting, UN Doc S/RES/1315 (14 August 2000).
[188] Special Court of Sierra Leone, The Special Court for Sierra Leone: Its History and Jurisprudence, Special Court of Sierra Leone<http://www.rscsl.org/>. accessed 12/9/2019
[189] ibid
[190] Chiara Giorgetti, The Rules, Practice, and Jurisprudence of International Courts and Tribunals (2012) *(MartinusNijhoff, 287)*
[191] Ibid
[192] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of Special Court for Sierra Leone, signed 16 January 2002, 2178 uNTS 137 (entered into force 12 April 2002) ('Statute of the Special Court for Sierra Leone')
[193] Statute of the Special Court for Sierra Leone, art 4 (c).
[194] ibid

The first trial involved three former military leaders of the AFRC, all of whom were convicted of crimes related to child soldiering. The trial of defendants Brima, Kamara, and Kanu centred on abduction, which is the forced participation of children in armed forces.[195] The guilty verdict and lengthy sentences handed down by the court were upheld in the appeal process, consequently reinforcing the universal prohibition against the use of children in armed conflict.[196] The AFRC Sentencing Judgment summarises the Court's view on child soldiering: Children were forcibly taken away from their families, often drugged and used as child soldiers who were trained to kill and commit brutal crimes against the civilian population. These child soldiers who survived the war were robbed of a childhood and most of them lost the chance of an education.[197]

The second trial saw the prosecution of CDF leaders MoninaFofana and AllieuKondewa.[198] The Trial Chamber acquitted Fofana of the charge of recruiting youths below the age of 15 into an armed group, reasoning that Fofana's presence at the base where child soldiers were present was insufficient to establish criminal liability. Kondewa was initially charged with recruiting child soldiers but the conviction was overturned during later appeals.

The final of the three trials focused on the surviving leaders of the RUF: Issa Hassan Sesay, Morris Kallon, and Augustine Gabo. During proceedings, Sesay and Kallon were convicted of pre-meditating the forcible recruitment of children into armed conflicts.[199] The RUF trial emphasised the recruitment and employment of children for both the purpose of active combat and non-combatant roles. Jointly, the three trials demonstrate a concerted determination to

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[195] Charles ChernorJalloh, The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law (2013) *(Cambridge university Press, 365.)*
[196] ibid
[197] *Prosecutor v Brima, Kamara and Kanu.* Supra
[198] *Prosecutor v Fofana and Kondewa.* Supra
[199] *Prosecutor v Sesay, Kallon, and Gabo.* Supra

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[195] Charles ChernorJalloh, The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law (2013) *(Cambridge university Press, 365.)*

[196] ibid

[197] *Prosecutor v Brima, Kamara and Kanu.* Supra

[198] *Prosecutor v Fofana and Kondewa.* Supra

[199] *Prosecutor v Sesay, Kallon, and Gabo.* Supra

show- case 'the widespread and systemic use' of child soldiers in Sierra Leone and to 'elucidate the criminalisation' of the custom.[200]

The use of children in warfare is disturbing. Children have been recruited in the Central African Republic, Syria, Nigeria and other countries and in some cases have been used to execute prisoners.[201]

3.3.2 The International Criminal Court

On 14 March 2012, MrLubangaDyilo was convicted of committing, as co-perpetrator, war crimes consisting of: Enlisting and conscripting of children under the age of 15 years into the Force patriotique pour la libération du Congo[Patriotic Force for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (punishable under article 8(2)(e)(vii)of the Rome Statute).The verdict was rendered by Trial Chamber I, composed of Judge Adrian Fulford (United Kingdom), as Presiding Judge, Judge Elizabeth Odio Benito (Costa Rica) and Judge René Blattmann (Bolivia). Although the first two judges had written separate and dissenting opinions on some issues, the verdict was unanimous. On 10 July 2012, Trial Chamber I sentenced Thomas LubangaDyilo to a total period of 14 years of imprisonment. The time he spent in the ICC's custody to be deducted from this total sentence. Theverdict and the sentence were confirmed by the Appeals Chamber on 1 December 2014. Crimes (non-exhaustive list)Trial Chamber I concluded that: -The Union des Patriotes Congolais ("UPC") was created on 15 September 2000; Thomas Lubanga was one of the UPC's founding members and its President from the outset. The UPC and its military wing, the Force Patriotique pour la Libération du Congo ("FPLC"), took power in Ituriin September

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[200]Charles ChernorJalloh, The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law (2013) *(Cambridge university Press, 365).*

[201] Jessica Stern and JM Berger, Raising Tomorrow's Mujahideen: The Horrific World of ISIS's Child Soldiers' *The Guardian (London, 10 March 2015) <http://www.theguardian.com/world/2015/mar/10/horror-of-isis-child-soldiers-state-of-terror> accessed 9 July 2016.*

2002. The UPC/FPLC, as an organised armed group, was involved in an internal armed conflict against the ArméePopulaireCongolaise("APC") and other Lendu militias, including the Force de Résistance Patriotique en Ituri("FRPI"), between September 2002 and 13 August 2003.- Between 1 September 2002 and 13 August 2003, the armed wing of the UPC/FPLC was responsible for the widespread recruitment of young people, including children under the age of 15, on an enforced as well as a "voluntary" basis. Multiple witnesses testified credibly and reliably that children under 15 were "voluntarily" or forcibly recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its military training camps, including at Rwampara, Mandro, and Mongbwalu. Video evidence clearly showed recruits under the age of 15 in the Rwampara camp. The evidence demonstrated that children in the military camps endured harsh training regimes and were subjected to a variety of severe punishments. –Children were deployed as soldiers in Bunia, Tchomia, Kasenyi, Bogoro and elsewhere, and they took part in fighting, including at Kobu, Songolo and Mongbwalu. It was established that the UPC/FPLC used children under the age of 15 as military guards. The evidence revealed that a special "Kadogo Unit" was formed, which was comprised principally of children under the age of 15. The Chamber was satisfied beyond reasonable doubt that: -the accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. As a result of the implementation of this common plan, boys and girls under the age of 15 were conscripted and enlisted into the UPC/FPLC between 1 September 2002 and 13 August 2003. -The UPC/FPLC used children under the age of 15 to participate actively in hostilities including during battles. They were used, during the relevant period, as soldiers and as bodyguards for senior officials including the accused. Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrated that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role as regards the activities

of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in the planning of military operations, and he played a critical role in providing logistical support, including providing weapons, ammunition, food, uniforms, military rations and other general supplies to the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara military camp, he encouraged children including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field after their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff members who were below the age of 15. The Chamber concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.

The United Nations (UN) has attempted to prevent the use of children in hostilities.[202] However, a strong international law response against this practice is still needed.[203] One such response is the release of the International Criminal Court (ICC)'s first ever Appeals Chamber decision on 1 December 2014.[204] The Appeals Chamber upheld the decision of the ICC's Trial Chamber on 14 March 2012 to convict Mr Thomas Lubanga of two war crimes: (a) enlisting and conscripting children under the age of 15 years; and (b) using children to participate

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[202] The UN found some success in sanctioning the use of children in hostilities in Côte d'Ivoire, but made very little progress when put- ting pressure on parties involved in violations against children in the Democratic Republic of Congo. See Security Council Report, Children and Armed Conflict (6th edn, 21 February 2014) 38–44 <http://www.securitycouncilreport.org/cross-cutting-report/ children-and-armed-conflict.php> accessed 9 July 2016. The UN has also launched a campaign along with UNICEF called 'Children, Not Soldiers' to end and prevent the recruitment and use of children by government security forces by the end of 2016, see UN Doc A/69/926–S/2015/409 (n 2) 4–5.

[203] Joshua Yuvaraj, When Does a Child Participate Actively in Hostilities under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga ' (2016) *(32(83) Utrecht Journal of International and European Law 69, DOI: http://dx.doi.org/10.5334/ujiel.321)*

[204] The Prosecutor v Thomas Lubanga Dyilo Supra

actively in hostilities.[205] Both decisions discussed the phrase 'participate actively in hostilities' in Article 8(2) (e)(vii) of the Rome Statute (Statute).[206] Both Chambers characterised the scope of the phrase broadly for the purpose of Article 8(2)(e)(vii). Therefore, Mr Lubanga was liable for using children to participate actively in hostilities.[207]

These decisions raise a number of concerns. Firstly, there is a tension between the broad approach taken by the ICC in Lubanga and the prevailing understanding of 'direct' participation in hostilities at international humanitarian law (IHL), which is quite narrow. 'Direct' participation in hostilities at IHL has traditionally related to the protection of civilians from being legitimately targeted during hostilities; that is, parties may not target civilians who are not directly participating in hostilities.[208] Moreover, both 'active' and 'direct' are viewed synonymously at IHL. Accordingly, it is unclear how the ICC's decisions will affect the protection of civilians at IHL. If 'active' denotes a broader scope of activities than previously understood, opposing parties could legitimately attack civilians on the basis that the civilians were 'actively' participating in hostilities. Secondly, it is not clear how to determine the types of activities falling within the scope of 'active' participation under the Statute's child protection provisions.[209] This uncertainty may lead to inconsistent jurisprudence on these crimes. Accordingly, future ICC Chambers may not effectively penalise the use of children in

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[205]The Prosecutor v Thomas LubangaDyilo. Supra

[206]Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 8(2)(e)(vii).

[207]Lubanga Trial Decision (n 7) paras 916, 1270–1272, 1351, 1356–1358.

[208] Joshua Yuvaraj, When Does a Child 'Participate Actively in Hostilities under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga (2016) *(32(83) Utrecht Journal of International and European Law 69, DOI: http://dx.doi.org/10.5334/ujiel.321)*

[209]ibid

hostilities. Thus, the Statute's aim 'to put an end to impunity for the perpetrators of these crimes and to contribute to the prevention of such crimes'[210] may be difficult to realise.[211]

3.3.3 Other Precedents

Child soldiers have never been tried for alleged war crimes by any of the international tribunals, special courts or any regional courts. However, the European Court of Human Rights (ECHR) did consider the issue of minimum age of criminal responsibility in cases of children accused of serious crimes. In T v. United Kingdom and V v. United Kingdom.[212]The applicants were both British citizens who were convicted of the abduction and murder of a two-year-old boy. Both T and V were 10 years old at the time of the crime. At the age of 11, they were tried for the crime in an UK court, found guilty and sentenced to an indefinite period of detention. The applicants approached the ECHR claiming violation of Article 3 of European Convention on Human Rights (ECHR) as their trial was conducted in public in an adult court, amounting to inhuman treatment.[213]The applicants claimed that the minimum age of criminal responsibility was very low in England and Wales as compared to other European Countries. The applicants also argued that even the CRC Committee recommended to UK (UN Doc. CRC/C/15/add.34) "that serious considerations be given toraising the age of criminal responsibility throughout the areas of UK."[214]

The ECHR held that there is no common standard on minimum age of criminal responsibility in member states of the Council of Europe. While considering the relevant international texts the ECHR found that relevant international texts and instruments do not provide any clear signs

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[210]Rome Statute, preamble; Jan Klabbers, Just Revenge? The Deterrence Argument in International Criminal Law' (2012) (12 Finnish Yearbook of International Law 251, quoted in Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 The International Journal of Transitional Justice 437)

[211] Joshua Yuvaraj, 'When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga' (2016) *(32(83) Utrecht Journal of International and European Law 69, DOI: http://dx.doi.org/10.5334/ujiel.321)*

[212]T v. United Kingdom, and V v. United Kingdom, Supra.

[213]Article 3-Prohibition of torture or inhuman and degrading treatment or punishment (ECHR)

[214]T v. United Kingdom, and V v. United Kingdom, Supra Para 61-62

on minimum age of criminal responsibility. The ECHR held that Rule 4 of the Beijing Rules do not specify any minimum age for criminal responsibility for the states, rather it only asks them not to fix criminal responsibility at a very low age.

Similarly, after studying Article 40(3)(a)of UNCRC the ECHR held that it only asks state to fix a minimum age for criminal responsibility but contains no guidance or provision on what that age should be.[215] Therefore, the ECHR held that the attribution of criminal responsibility to the applicants in itself does not violate Article 3 of ECHR.

However, while examining the claim under Article 6 (Fair Trial Rights), the ECHR did find a violation of fair trial rights as the applicants were unable to participate effectively in the proceedings within the adult trial setup.[216]

For the purposes of this research, the partly dissenting opinion of Judges Pastor Ridruejo, Ress, Makarcyzk, Tulkens and Butkevych is of value. The minority held that the trial procedure and sentencing combined with age of criminal responsibility constituted a violation of Article 3 of ECHR. They disagreed with the majority's assessment on the minimum age for criminal responsibility and Article 3-Prohibition of torture or inhuman and degrading treatment.

The introduction to Dissent Opinion Para 1stated that since only 4 out of the 41 states in the Council of Europe has minimum age of criminal responsibility at par or lower than England and Wales, it means that there is a definite general standard among member states on the minimum age of criminal responsibility and also on special court procedures for juveniles. Further, the minority held that even though Rule 4 of Beijing Rules doesnot give any clear indications, it does not mean that the warning given therein should not be respected. The warning in it clearly indicates that both age and maturity are interrelated and the view that this

[215]Ibid, Para 71
[216]Ibid, Para 88-89

maturity is not present in children below the age of 13 or 14 prevails in the majority of member states.

The minority stated that (i) treating children of ten years of age as criminally responsible, (ii) prosecuting them at the age of eleven in an adult court, and (iii) subjecting them to an indeterminate sentence, reached a substantial level of mental and physical suffering. Bringing the whole weight of the adult criminal processes to bear on children as young as eleven is, in our view, a relic of times where the effect of the trial process and sentencing on a child's physical and psychological condition and development as a human being was scarcely considered, if at all.

The dissenting opinion is critical to us because there is acceptance on existing general standard on minimum age of criminal responsibility in member states of Council of Europe. Also, the reasoning of the minority is in line with the principle of best interest of the child, where the minority has done narrow reading of the Beijing Rules. Accordingly, it concluded that states should not take opportunity to fix low age of criminal responsibility because there is nothing given in Beijing rules.

CHAPTER FOUR

LEGAL PROTECTION OF CHILDREN IN ARMED CONFLICT

4.1 Additional Interventions on the Rights of the Child Not to be involved in Armed Conflict

Encouraged by the overwhelming support for the Convention on the Rights of the Child, demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child, Reaffirming that the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security, Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development, Condemning the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places that generally have a significant presence of children, such as schools and hospitals, Noting the adoption of the Rome Statute of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict, Considering therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict, Noting that article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier, Convinced that an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle

that the best interests of the child are to be a primary consideration in all actions concerning children, Noting that the twenty-sixth International Conference of the Red Cross and Red Crescent in December 1995 recommended, inter alia, that parties to conflict take every feasible step to ensure that children below the age of 18 years do not take part in hostilities, Welcoming the unanimous adoption, in June 1999, of International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, inter alia, forced or compulsory recruitment of children for use in armed conflict, Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard, Recalling the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law, Stressing that the present Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law.[217]

Bearing in mind that conditions of peace and security based on full respect of the purposes and principles contained in the Charter and observance of applicable human rights instruments are indispensable for the full protection of children, in particular during armed conflict and foreign occupation, Recognizing the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to the present Protocol owing to their economic or social status or gender, Mindful of the necessity of taking into consideration the economic, social and political root causes of the involvement of children in armed conflict, Convinced of the need to strengthen international cooperation in the implementation of the present Protocol,

[217]Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 2000

as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict,

Encouraging the participation of the community and, in particular, children and child victims in the dissemination of informational and educational programmes concerning the implementation of the Protocol,[218]

State parties agreed to take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities and to ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.[219]

They also agreed to raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection. Each State Party to deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.

States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:

(a) Such recruitment is genuinely voluntary;

[218]Preamble to the optional protocol opcit
[219]Article 1

(b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;

(c) Such persons are fully informed of the duties involved in such military service;

(d) Such persons provide reliable proof of age prior to acceptance into national military service.[220]

It was agreed that each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General. The requirement to raise the age does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Furthermore, Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction. States Parties undertook to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike. They are to take all feasible

[220] Article 4

measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.[221]

States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations, and to provide such assistance through existing multilateral, bilateral or other programmes or, inter alia, through a voluntary fund established in accordance with the rules of the General Assembly.

Each State Party shall, within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment. Following the submission of the comprehensive report, each State Party shall include in the reports it submits to the Committee on the Rights of the Child, in accordance with article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol.[222]

More so, Any State Party may denounce the present Protocol at any time by written notification to the Secretary- General of the United Nations, who shall thereafter inform the other States

[221]Article 5
[222] Article 8

Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. If, however, on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee on the Rights of the Child prior to the date on which the denunciation becomes effective.

4.2 The Accountability Gap

International laws, developed over many decades, demonstrate that the international community fully appreciates the importance of protecting children in conflict. However, those good intentions are undermined by two underlying weaknesses: the fragmented nature of legal protection in international humanitarian law and international human rights law, and the lack of compliance with, and implementation of, what protection there is. Derived chiefly from the Geneva Conventions, the Additional Protocols and customary international law, international humanitarian law includes protection for civilians during war or conflict, principally as carried out between states. Meanwhile, international human rights law consists of a variety of instruments that apply in peace time as well as in war, and also exists as a matter of customary international law. The instruments, some of which are regional such as the European Convention on Human Rights address a range of issues, such as the prevention of torture, the elimination of racial discrimination and, in the CRC, the rights of the child. This patchwork of civil laws and instruments means that identifying and applying the applicable legal framework

for protecting children during conflict is a complex task.[223] For example, the international humanitarian law rule that children warrant special protection in armed conflict can be found in three different sources (Additional Protocol I; Additional Protocol II and customary international law) and it is differently expressed in each formulation. This complexity is likely to be particularly difficult for non-state armed groups (some of whom have political aspirations which motivates them to seek legitimacy, including by acting in compliance with international law) and victims, both of which are less likely to benefit from access to expert legal advice and representation than states. International criminal law is easier to identify since it has been collected in the Rome Statute, which also created a means of prosecuting individuals for war crimes and crimes against humanity — the ICC. For all the challenges faced by the ICC, it is an important source of accountability. But the Rome Statute has not been as widely ratified as it should be and so the accountability it provides is limited. Furthermore, although individual criminal accountability is important, it should be supplemented by the wider, systemic protections provided by international humanitarian law and international human rights law. In contrast to international criminal law, there is no singular instrument that sets out the legal framework for international humanitarian law or international human rights law and that can be applied to children in armed conflict. As a consequence, there is no civil international body with the specific jurisdiction to resolve claims by victims or monitor compliance and provide accountability. The lack of such a mechanism at the international level makes it extremely challenging for victims to secure accountability. But it also means that domestic implementation and enforcement of the relevant civil international law is less effective and less developed than it should be.[224]

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[223] https://reliefweb.int/sites/reliefweb.int/files/resources/ProtectingChildren-Summary.pdf Accessed 6th December, 2019

[224] opcit

4.3 Improvements to Existing Laws

There are five main reasons why a single civil instrument with its own accountability mechanism (such as a court or tribunal) would help address the systemic problems hindering the protection of children in conflict: Accountability One instrument would make it easier (i) for states to implement the necessary domestic laws and to facilitate the enforcement of those laws before domestic courts and (ii) for an international institution to monitor and assess the adequacy and effectiveness of that domestic implementation. Easy identification the new instrument would collect currently scattered legal provisions in one place and codify existing rules in customary international law. That contrasts with the present situation where the multiplicity of instruments and associated bodies creates greater risk of confusion, omission or inaction. Simplification One instrument would reduce the present need (i) to work out what the various sources of law provide; (ii) to work out when they apply; (iii) to ascertain whether one source is more protective than another and (iv) to consider the relationship between treaty provisions and customary international law. Clarification The new instrument would clarify the law by defining important, but presently vague, concepts or terms and identifying more precisely the scope of unclear protections. Develop standards the new instrument would also provide an opportunity to develop the law. The new instrument would not require the invention of a new architecture. Even if this were desirable, the political obstacles to the collective action required would be considerable. Building on the foundations of the current CRC system is likely to be more practical and more effective.[225]

The CRC already has three: the Optional Protocol on the involvement of children in armed conflict, which raised the age for participation in armed conflict to 18; the Optional Protocol on the sale of children, child prostitution and child pornography, and another on a

[225] opcit

communications (i.e. accountability) procedure. It would, at the very least, cover the 'six grave violations' of children's rights during armed conflict already monitored by the Special Representative, namely: (i) recruitment or use of children; (ii) killing or maiming of children; (iii) sexual violence against children; (iv) attacks against schools or hospitals; (v) abduction of children; and (vi) denial of humanitarian access to children. Implementation of a single instrument. Given the experience and knowledge already residing in the CRC Committee and its 18 experts, it would be fitting to expand its functions to include those relating to the new instrument. The CRC could, therefore, be endowed with the power to monitor domestic implementation of the instrument, receive complaints from victims and conduct inquiries regarding violations of the rights contained therein. The role of the Special Representative for Children and Armed Conflict would enlarge, in order to assist the CRC Committee in its expanded role. The instrument would bind both states and non-state armed groups. States would be required to ratify and implement the relevant parts of the Optional Protocol into their domestic laws. Non-state armed groups would be encouraged to pledge to uphold the standards in it and to accept the related competence of the CRC Committee. Unlike the ICC, the CRC Committee would be able to receive complaints directly from victims and their families. The CRC Committee already has that competence in relation to the CRC in general (and where States have ratified the third Optional Protocol), as do other UN treaty bodies (for example those that exist under the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Discrimination Against Women). Those complaints would be made and determined on paper, i.e. without hearings.[226] The CRC Committee would also have the jurisdiction to conduct inquiries and to hear evidence, where necessary. We recognise that there may be reservations about our suggestion of one new

[226] https://reliefweb.int/sites/reliefweb.int/files/resources/ProtectingChildren-Summary.pdf accessed 15 December, 2019

nstrument. It could be argued that it would further fragment international law and undermine what coherence there is. We would contend that the new instrument would only be fragmentary if it was treated as yet another source of law. It should not be. It should be regarded and used as a comprehensive coherent source of international humanitarian and human rights law, offering the best opportunity, especially in the long term, of providing clear and enforceable protection for children in armed conflicts.

In addition to the single instrument and accompanying civil accountability mechanism, the report also calls for improvements to be made to the substance of existing law. These improvements could be made even if the suggestion of the single instrument is not pursued; if the instrument is pursued then these improvements could be made to the law as contained in that instrument. There are three broad categories of improvements: Some laws are vague or ambiguous and need to be clarified. One example is that the position (under the Geneva Conventions and the Rome Statute) of 'child soldiers' abused by their own group is currently unclear. Some protections are under-developed or even absent and need to be strengthened. For example, schools and hospitals are protected by general humanitarian protections regarding civilian objects. But there is no specific prohibition on targeting schools, whereas there is one for hospitals, even though they, like hospitals, contain a vulnerable category of people-children-who warrant special, express protection. Consideration should be given to changing the law to establish a specific prohibition on targeting schools. Another example is that parties to conflicts do not have an obligation to agree measures such as temporary ceasefires and humanitarian pauses to ensure humanitarian access to children in conflict areas. The law should be developed so that parties to conflicts are obliged to try to agree such measures. Some instruments would benefit from greater ratification, which would demonstrate political will and commitment to upholding the norms and mechanisms in these instruments. For example, Additional Protocol I and Additional Protocol II to the Geneva Conventions, the three Optional

Protocols to the CRC listed above, and the Rome Statute. All these steps would enhance the substance of available protections as well as international accountability.

CHAPTER FIVE

CONCLUSION

5.1 Summary of Findings

The Statutes on child protection prohibit the use of children to 'participate actively in hostilities' and are based on Article 77(2) of AP I and Article 4(3)(c) of AP II. However, this prohibition differs from the blanket prohibition on all participation in hostilities in Article 4(3)(c) of AP II for non-international armed conflict. 'Active' and 'direct' in the Statute's child protection provisions and Article 77(2) of AP II should be amended to prohibit any participation of children whatsoever. Many fear that broadening 'active' participation in hostilities under the child protection provisions will cause civilians who indirectly participate in hostilities to be legitimately targeted.[227] The Appeals Chamber appeared to address this concern by interpreting 'active' in civilian protection provisions like Common Article 3 differently to 'active' in the Statute's child protection provisions, also commenting that IHL child protection provisions should be interpreted broadly according to their purposes. Defendants who use children to participate in hostilities will be more successfully prosecuted if 'active' is interpreted to include a broader scope of activities in the child protection provisions. Moreover, if 'active' also connotes a narrow definition in the civilian protection provisions like Common Article 3, armed groups will not be justified in targeting civilians who do not meet the high threshold for direct participation outlined in the Guidance. This approach still does not address the different standards of participation prohibited at non-international armed conflict in Article 4(3)(c) of AP II and Article 8(2)(e)(vii) of the Statute. However, it is

[227] Joshua Yuvaraj, 'When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga ' (2016) *(32(83) Utrecht Journal of International and European Law 69)*

preferable when considering the potential difficulty of successfully amending the latter provision.

Nevertheless, future Chambers may not follow this reasoning. For instance, the ICC Pre-Trial Chamber in the Ntaganda Confirmation of Charges Decision noted that it needed to assess whether children were taking a direct/active part in hostilities at the time they were victims of acts of rape and/or sexual slavery in order to determine whether they were entitled to protection from these acts.[228] Despite the Lubanga Appeals Chamber's reasoning, the Ntaganda Pre-Trial Chamber used Article 4(3)(c) of AP II as reflected in Article 8(2) (e)(vii) of the Statute to assess the direct/active participation in hostilities of children in the facts before them and appeared to equate direct/active participation under these provisions with a loss of protection under IHL.[229]This is problematic on two levels. Firstly, the Pre-Trial Chamber did not recognise that Article 4(3)(c) of AP II does not introduce a 'direct' or 'active' qualifier to participation in hostilities: rather, it is a blanket prohibition on such participation. Therefore, that provision can arguably only be used to determine what 'participation in hostilities' means, rather than what 'participate actively in hostilities' means. Secondly, the Pre-Trial Chamber appears to assume that the interpretation of a provision drafted to protect children from use in hostilities can affect the interpretation of the same word in a provision drafted to distinguish between civilians and combatants. If this is so, future ICC Chambers may be more hesitant to interpret 'active' and 'direct' in the child protection provisions broadly because of fears that the scope of protection available to civilians may be narrowed.[230] However, it has so far been demonstrated that the scope of protection is not likely to be narrowed. Accordingly, the approach of the Lubanga Trial and Appeals Chambers should be preferred to the Ntaganda Pre-Trial Chamber's

[228]The Prosecutor v Bosco Ntaganda Supra
[229]ibid paras 78–79.
[230] Joshua Yuvaraj, 'When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga ' (2016) (*32(83) Utrecht Journal of International and European Law 69)*

interpretation in future ICC decisions, as the former gives voice to the purposes of both the child and civilian protection provisions in the Statute and at IHL.

The lack of trustworthy promises and credible commitment makes the suffering of children on battlefields look like an endless and hopeless tragedy-but it need not be. We know what needs to be done; in fact, the international community has agreed to it several times over. What is lacking is a commitment to act, and the resources to go with it[231] Action is crucial because words on paper do not save those in danger. It is urgent to shift energies 'from the juridical project of elaborating norms to the political project of ensuring their application and respect on the ground'. This objective would be reached 'if the international community was prepared to employ its considerable collective influence to that end'.[232] Holding perpetrators of war-time crimes against children accountable and punishing them in a systematic and just manner will be both curative and preventive: it will contribute to the alleviation of the current suffering of children in armed conflicts and it will spare emerging generations the same fate, thus ultimately fulfilling the great promise enshrined in the United Nations Charter-the very *raison d'être* of the Organization-to save succeeding generations from the scourge of war. One of the main conclusions of the Special Session on Children (May 2002) was that the promotion of the well-being of children remains an unfinished agenda and, as a matter of consequence, there must be further progress in the coming decade to complete the unfinished agenda of the [1990] Summit for Children and to tackle some emerging issues that imperil the well-being of children in the twenty-first century.[233]A first-order priority could be monitoring and enforcing compliance with legal norms aimed at the protection of children in armed conflicts. As previously noted,

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[231]Gro Harlem Brundtland, address to the WHO/UNICEF Global Consultation on Child and Adolescent Health and Development, Stockholm, 12 March 2002

[232] Comments from Olara Otunnu before the Security Council, on 25 August 1999. Security Council Strongly Condemns Targeting of Children In Situations of Armed Conflict, Including their Recruitment and Use as Soldiers, United Nations Press Release SC/6716 of 25 August 1999.

[233] . We the Children: End-decade review of the follow-up to the World Summit for Children. Report of the Secretary General, document A/S-27/3 of 4 May 2001, para. 16, at <http://www.unicef.org/specialsession/documentation/ documents/a-s-27-3e.pdf>.accessed 30/10/2019

the legal basis for such action is already in place. In addition to the sources of international law defined in the Statute of the International Court of Justice (article 38), Security Council resolutions as well as certain resolutions of a specific nature of the United Nations General Assembly are legally binding upon Member States.[234] Additionally, article 38 of the Convention on the Rights of the Child, the Optional Protocol to this Convention, article 8 of the Statute of the International Criminal Court, article 24 of the Geneva Convention relative to the Protection of Civilian Persons in A first-order priority could be monitoring and enforcing compliance with legal norms aimed at the protection of children in armed conflicts.

Many legal regimes strongly condemn the brutalization and the killing of children on battlefields. Under certain circumstances, even declaratory statements like those made at diplomatic gatherings can become legally binding, since the results of such meetings may constitute cogent evidence of the state of the customary law on the subject concerned[235]

Taken together, this is a powerful legal arsenal that only needs to be applied-to hold accountable and bring to justice those terrorizing innocents. More precisely, the 1999 Security Council resolution on children strongly condemns the victimization of children in armed conflict and 'calls upon all parties concerned to comply strictly with their obligations under international law, in particular the Geneva Conventions of 12 August 1949 and the obligations applicable to them under the Additional Protocols thereto of 1977 and the United Nations Convention on the Rights of the Child of 1989'. Significantly, the Council, in a clear and uncompromising way 'stresses the responsibility of all States to bring an end to impunity and their obligation to prosecute those responsible for grave breaches of the Geneva Conventions of 12 August 1949'. In resolution 1379 of 20 November 2001, the Security Council again urged member States to put an end to impunity, prosecute those responsible for genocide, crimes

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[234] On the sources of international law, see for instance Malcolm N. Shaw, (2001)*(International Law, Cambridge, Cambridge University Press (4th edition), pp. 54-98).*

[235] Ian Brownlie, Principles of Public International Law, (1999) *(Oxford University Press (5th edition), p.14).*

against humanity, war crimes, and other egregious crimes perpetrated against children and exclude, where feasible, these crimes from amnesty provisions and relevant legislation, and ensure that post-conflict truth-and- reconciliation processes address serious abuses involving children.

5.2 Observations

International justice has undoubtedly contributed to the increasing recognition of the harm that violence and conflicts cause for children and to the extent of their victimization from mass, systematic crimes. Two international courts have played a particular role in this respect. Sierra Leone's Special Court has been a pioneer, ensuring that the recruitment and use of child soldiers is recognized as an international crime and that those responsible are held accountable. The International Criminal Court has continued this trend, bringing to the world's attention the plight of children associated with armed forces and groups by focusing on their unlawful recruitment and use in its first and highly publicized trial. These significant contributions should not be understated, and the courts are to be congratulated for their efforts to assert the responsibilities of those who have recruited and exploited child soldiers. Yet much more is needed to better protect children, notably those who may have participated in the commission of crimes, as well as all those involved as victims of crimes or as witnesses before international courts. International and mixed courts, which concentrate on those bearing the greatest responsibility for the worst crimes, address the commission of crimes against rather than by children. Children should not be among those held accountable internationally. Even if they have participated in crimes defined under international law, children should be considered primarily as victims, especially when circumstances are inherently coercive, which is typically the case, especially during armed conflict and for child soldiers.

Military traditions neither permits nor encourages the conscription of children, regardless of how the concept of "child" is defined, the argument in favour of children bearing arms would

fail. With not even the justification of culture to support this practice, what consequences should attach to breach of an international human rights prohibition on the recruitment of children?

States that ratified the UN Convention on the Rights of the Child or the African Charter undertake to protect children within their jurisdiction from abuse and exploitation. Special provisions in both Conventions oblige states to refrain from recruiting children and to ensure respect for rules of international humanitarian law which affect children during armed conflicts. States parties are also obliged to pass appropriate legislative and administrative measures to implement the rights listed in the treaties.

The number of states prepared to undertake these obligations was surprisingly high; but then a verbal assent to the morally unquestionable cause of children cost little. Compelling signatories to carry out their undertakings, however, is another matter. The major enforcement mechanism in the treaties is a reporting/inquiry procedure. Under the UN Convention parties must submit regular reports to an international committee on steps they have taken to fulfil their treaty obligations. Under the African instrument a like committee may initiate its own investigations about parties' efforts to implement the Charter.

These committees have no authority to receive complaints from other states, NGOs or, more significantly, from individuals. Nor do the committees have any power to penalise states that have violated children's rights. They can do no more than offer an offending state their comments and recommendations for improvement. In the absence of any material sanction against offenders, child conscripts must rely on the legal infrastructure (which is often inadequate) and political goodwill of states to take action on their behalf. A government could conceivably be sued in its own courts for failing to protect children, if a concerned NGO or children's organisation were prepared to take up the issue. Nevertheless, the success of such an

intervention would depend upon whether the state's constitution included a justiciable bill of rights or upon whether the international Conventions had been fully incorporated into its legal system.

Because there are so many obstacles in the way of holding states responsible, a simpler option would be to impose criminal liability on the persons who conscript children. Establishing the necessary elements of the crime in particular cases might be troublesome as some questions will arise viz; was the child coerced into bearing arms? Did he/she voluntarily become attached to an army? How should distinctions be drawn between bearing arms and performing non-combatant duties? etcetera. That notwithstanding, this approach has the merit of fixing responsibility on individual military commanders. What is more, if the crime is deemed an international offence, prosecution of the offender would not be left in the hands of the government in whose jurisdiction the offence was committed, any state is entitled to try and punish those who commit international crimes. In the circumstances, criminalising the exploitation of children for military purposes seems the most sensible way of eliminating this extremely harmful practice.

Critical questions concerning child soldiers, particularly voluntary child soldiers, need to be answered in order for domestic courts to pursue justice following terrorist attacks. In light of the many young men and women voluntarily joining extremist groups, the current laws and discourse of victimization must be updated. The following questions need to be answered to ensure domestic prosecutions of young terrorists are done in a fair and just manner: What is voluntariness? At what age can a child soldier voluntarily fight in an armed conflict, and more importantly, at what age should voluntariness result in prosecution?

The law can hold children accountable without violating children's rights by protecting their immaturity and sensitivity. it is presumed that juveniles are not as morally culpable as adults,

but the juveniles are not excused from criminal responsibility altogether. The juvenile justice system in the United States has set up flexible ways for youth to be punished, but also rehabilitated, through community service programs and placement at treatment-based facilities[236]

If the teenagers who have fled the country to join ISIS are tried in domestic courts, the concern over their treatment as juveniles is not as grave. In 2015, a nineteen-year-old female was prosecuted in federal court for conspiracy to support ISIS, revealing that many of these teenagers may not be tried in military commissions if they are apprehended before engaging in armed conflict.[237]

The most alarming sign of the world's lack of commitment is that the failure to translate promises into action was not because the goals were too ambitious or were technically beyond reach, promises were not achieved simply 'because of insufficient investment'.[238] The 1990 Declaration stated that 'there can be no task nobler than giving every child a better future' and world leaders offered great promise to children with this powerful and unequivocal statement: 'we are prepared to make available the resources to meet these commitments'.[239]Despite the fact that the world contains a $30 trillion global economy, 'the resources needed to achieve goals for all children have not been forthcoming in the necessary amounts and in the places where they are most needed'.[240]

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[236] R. Daniel Okonkwo and Dylan Nicole De Kervor, There Are Two Sides to Every Story: Collaboration Between Advocates and Defenders in Achieving Systemic Juvenile Justice Reform, (2012) *15 U. PA. J.L. & SOC. CHANGE 435, 451).*

[237] Michael Martinez, Ana Cabrera, and Sara Weisfeldt, Colorado woman gets 4 years for wanting to join ISIS, CNN (2015) *<http://www.cnn.com/2015/01/23/us/ colorado-woman-isis-sentencing> accessed 30/10/2019*

[238]We the Children (2001), op. cit., para. 33.

[239] See World Declaration ..., 1990, op. cit., para. 24–25.

[240]We the Children (2001), *op. cit., para. 244.*

5.3 Recommendations

The international community must address the root causes of conflicts more than the instruments used in the conflict. If the root cause of a conflict is identified and settled, the problem of child soldiers will be solved. But if the root cause of the conflict is not identified and solved, the conflict will crop up again and children may be forced to fight again.

It is recommended that States should include the concept of child-specific protection in peacetime training and exercises at all levels of the armed and national security forces.

The international community have to work collectively to update existing rules of international law to reflect the increased participation of children in hostilities and to initiate the necessary enforcement and rehabilitation mechanisms. The first step is to increase the visibility of the problem. In the case of child soldiers, the United Nations Security Council has passed a series of resolutions condemning the recruitment and use of children in hostilities

Child soldiers should never be prosecuted under the age of fifteen. However, prosecution of children between fifteen and eighteen is not necessarily the best way to implement the right to reintegration promoted by the CRC. This is the reason why children between fifteen and eighteen could be held accountable in ways other than criminal prosecutions, for instance by using mechanisms of transitional justice other than criminal

Implementing an international criminal tribunal for juveniles between the ages of fifteen and eighteen strikes the proper balance between accountability and rehabilitation. While protecting children who are presumed not to have the capacity to infringe the penal laws, a tribunal would also highlight the unacceptable nature of the crimes voluntarily committed by child soldiers above the minimum age of criminal responsibility. The tribunal would provide an element of justice and a sense of closure for the victims while simultaneously promoting a child's rehabilitation and reintegration into society. Such a tribunal would show the international

community that unacceptable voluntary behaviour will not be tolerated, but more importantly, it will provide protection for children and serve as a significant step in deterring the use of child soldiers in armed conflicts around the world.

The 'era of implementation' of the Optional Protocol brought in by Security Council resolution 1440 will require more than just targeted interventions to prevent states and non-state actors from recruiting children and specialized disarmament, demobilization and reintegration programmes. Responsibility must not rest only on the shoulders of a few predators and a handful of non-governmental organizations with the mandate to protect and rehabilitate children. Peace processes, sustainable disarmament, demobilization and reintegration and post-conflict recovery need therefore to reflect on mobilization. This means replacing incentives to violence with incentives to peace and stability. Peace that does not offer dividends to African youth, per se, and overlooks the significance of this group will not be peace for the majority. For Africa, it means taking a long look at the African Charter on the Rights and Welfare of the Child and understanding what a powerful, home-grown conflict prevention tool it could actually be.

While many, if not most of the grave crimes committed against children are perpetrated in the course of armed conflicts, more consideration should be devoted to international crimes committed against them in other contexts. These should include targeting of children as part of a genocide campaign and the widespread enslavement of children, which constitutes a crime against humanity. These crimes are not yet receiving sufficient attention, although the appointment in 2009 of the first Special Representative of the United Nations Secretary General

on Violence against Children is a cause for hope.[241] But reporting crimes and raising awareness, while crucial, do not amount to accountability.

There is some uncertainty as to how the Statute should be interpreted.[242] The Statute, as a treaty, is subject to the VCLT. Accordingly, it is recommended that the Statute's provisions should be interpreted in good faith in accordance with their ordinary meanings, in their contexts and in the light of their objects and purposes.[243] However, Article 22(2) of the Statute adopts a stricter approach to interpretation.[244] How these approaches should be balanced is unclear.[245] However, 'the judges of the Court will have to resolve this tension without any substantial assistance from the Statute.[246] Moreover, the exact scope of 'active' in the Statute's child protection provisions was unclear prior to the Lubanga Trial Decision. The Elements of Crimes of both Articles 8(2)(e)(vii) and 8(2)(b)(xxxvi) do not provide relevant guidance.[247] As scholars have noted, the ICC needs to determine the exact meaning of these provisions and their relation to other related provisions in the Additional Protocols and the CRC.[248]

Furthermore, perpetrators also have the right to justice. However, this does not mean that heinous crimes should go unpunished but rather that child soldiers should be viewed humanely

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[241]This appointment is in line with the recommendation included in the 2006 Secretary-General's Study on Violence against Children. The Secretary-General appointed Marta Santos Pais, a long-time child rights advocate and an outstanding practitioner.

[242] William A Schabas, The International Criminal Court: A Commentary on the Rome Statute (2010) *(OUP 252. @pg 93)*

[243] VCLT, art 31(1);

[244] Article 22 of the Rome Statute reads as follows: '[t]he definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'

[245]Joshua Yuvaraj. 'When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga ' (2016) *32(83) Utrecht Journal of International and European Law 69, DOI: http://dx.doi.org/10.5334/ujiel.321*

[246]ibid

[247]ICC, Elements of Crimes (ICC 2011) 31, 39 (Elements of Crimes). For example, the first element of the crime under art 8(2)(e)(vii) is that 'the perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to par- ticipate actively in hostilities.' The remaining elements deal with the age of the person (element 2), the mensrea of the perpetrator (element 3), the context of the conflict (element 4) and the perpetrator's awareness of the factual circumstances establishing the existence of the conflict (element 5).

[248] Joshua Yuvaraj, 'When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga ' (2016) *(32(83) Utrecht Journal of International and European Law 69, DOI: http://dx.doi.org/10.5334/ujiel.321)*

in the light of the fact that they are primarily victims. Hence, all international juvenile justice standards should be followed and they should be tried through special juvenile courts. Also, the punishment meted out should not be punitive but reintegrative in nature.

The Special Court for Sierra Leone (SCSL) provided relevant commentary in the AFRC judgment.[249] It concluded that active participation in hostilities in Article 4(c) of the SCSL Statute which is extremely similar to the child protection provisions in the Rome Statute was 'not limited to participation in combat.[250] Rather, it included 'any labour or support that gives effect to, or helps maintain, operations in a conflict like carrying loads for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields.'[251]The SCSL also concluded that 'an armed force requires logistical support to maintain its operations any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.'[252] These interpretations both exceeded the usual scope of active/ direct participation in hostilities according to the principle of distinction.[253] It remained to be seen whether the ICC in Lubanga would adopt a similar approach. Consequently, it is hereby recommended that all stakeholders find a common ground and be uniform in the prosecution of cases where children are used as child soldiers.

Furthermore, the Linguistic Inconsistencies should be addressed. Some argue that 'active' in the Statute's child protection provisions should be interpreted synonymously with 'direct' at

[249]The Prosecutor v Brima, Kamara and Kanu Supra.
[250]AFRC Judgment (n 115) para 737.
[251]ibid
[252] ibid para 1267; Charles Jalloh and Simon M Meisenberg (eds), The Law Reports of the Special Court for Sierra Leone Volume I: Prosecutor v Brima, Kamara and Kanu (Brill 2012) 1533.
[253] Joshua Yuvaraj, 'When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga ' (2016) *(32(83) Utrecht Journal of International and European Law 69, DOI: http://dx.doi.org/10.5334/ujiel.321)*

IHL because the words are viewed synonymously at IHL.[254] Two sub-arguments are used to support this notion: (a) the consistent use of the same phrase in the equally authentic French versions of Common Article 3 and other IHL instruments; and (b) the fact that Common Article 3 is codified in the Statute. In relation to (a), the same French phrase (*participant directement*) is used in the equally authentic French versions of the Geneva Conventions and the Additional Protocols, despite the use of 'active' and 'direct' in the English versions. Because 'active' and 'direct' are interpreted primarily according to the principle of distinction at IHL, the argument is that 'active' in the Statute must be interpreted narrowly as well.[255] However, '*participentdirectement*' is not used in the French version of the Statute. Rather, Article 8(2)(e)(vii) uses '*participeractivement*'.[256]

If one can argue that the use of the same phrase for different English words in the IHL instruments means there is no difference in meaning between the words, one can also argue that the Statute's drafters intended for a meaning to be applied in the child protection provisions that is different from the meaning attributed to 'direct' at IHL according to the principle of distinction. Therefore, the use of the same phrase in the French IHL provisions does not conclusively demonstrate that the Statute's drafters intended the meaning of 'direct' to be transposed to the meaning of 'active' in the Statute. In relation to (b), Urban argues that because Common Article 3 is codified in Article 8(2)(c) of the Statute, the interpretation of 'active' according to the principle of distinction must be applied when interpreting 'active' in other parts of the Statute like Article 8(2)(e)(vii).135 Nevertheless, 'active' in the Statute's child protection provisions should be interpreted more broadly than 'direct' as defined by the

[254]Melzer, 'Interpretive Guidance' (n 22) 43, 45; Akayesu (n 31) para 629; Natalie Wagner, 'A Critical Assessment of Using Children to Participate Actively in Hostilities in Lubanga: Child Soldiers and Direct Participation' (2013) 24 Criminal Law Forum 181.

[255] Chris Jenks, 'Law as Shield, Law as Sword: The ICC's Lubanga Decision, Child Soldiers and the Perverse Mutualism of Direct Partici- pation in Hostilities' (2013) (3 *University of Miami National Security and Armed Conflict Law Review 106, 121; Melzer, 'Interpretive Guidance' (n 22) 43–44; Waschefort (n 5) 63).*

[256] Rome Statute, art 8(2)(e)(vii) (French translation).

principle of distinction, as these provisions aim to protect all children from use in hostilities.[257] Accordingly, the existence of Article 8(2)(c) does not preclude the broad interpretation of 'active' in the child protection provisions according to their purposes.[258]

The Trial Chamber's reasoning was also criticised for making child soldiers more targetable. This is because the scope of persons who may be legitimately targeted by an adverse party with impunity will increase as more people are categorised as participating directly in hostilities.[259] However, the use of different principles to interpret the different IHL and Statute provisions addresses these concerns. The principle of distinction should be used to interpret provisions like Common Article 3, and the purpose of protecting children used to interpret provisions like Article 8(2)(e)(vii).[260] Accordingly, a broader interpretation of 'active' in the Statute's child protection provisions protects the interests of children without affecting the protection of civilians under IHL provisions according to the principle of distinction. It would not involve 'giving with one hand while taking with the other' because the two standards of 'active' are located at different levels.[261] The Statute itself indicates that the interpretation of a provision in the Statute will not limit or prejudice existing or developing rules of international law for other purposes.[262] Therefore, the interpretation of 'active' for the purpose of protecting children is likely not to affect the interpretation of 'active' or 'direct' for the purpose of distinguishing

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[257] Christine Byron, War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court (2009) *(Manchester University Press 168–169; Roman Graf, 'The International Criminal Court and Child Soldiers' (2012) 10 Journal of International Criminal Justice 964.)*

[258] Joshua Yuvaraj, 'When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga ' (2016) *(32(83) Utrecht Journal of International and European Law 69)*

[259] See Jenks, Wagner and Matthew 'The Protection of Children Against Recruitment and Participation in Hostilities: International Humanitarian Law and Human Rights Law as Complementary Legal Frameworks' (2014) *(44 Collegium 99, 105; Terry D Gill and others (eds), Yearbook of International Humanitarian Law, Vol 15 (TMC Asser Press 2014) 78; Urban (n 135).*

[260] Joshua Yuvaraj, 'When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga ' (2016) *(32(83) Utrecht Journal of International and European Law 69)*

[261] ibid

[262] Art 10 of the Rome Statute reads as follows: 'nothing in this Part shall be interpreted as limited or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.'.

between combatants and civilians. A narrow interpretation of 'active' in the Statute's child protection provisions could also lead to individuals like MrLubanga being acquitted even though the evidence demonstrates that they have used children to participate actively in hostilities. A broad approach is necessary to cover as wide a range of activities as possible within the meaning of 'active', and in doing so remove any justification for using children in hostilities.[263]

5.4 Suggested Areas for Further Studies

The following issues are excluded from the scope of this dissertation:

The distinction between international and non-international armed conflicts with respect to the protection of children in situations of attacks in IHL needs to be drawn.

Internal conflicts were for long perceived as an exclusive internal matter subject to the sovereignty of the state rather than subject to international regulation.[264] However, there is an increasing trend in international law to disregard the distinction between the IHL rules pertaining to IACs and NIACs. Some commentators view that this distinction "frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs". Others perceive it as "arbitrary",[265] while many consider it undesirable and "difficult to justify."[266] The said dichotomy is losing its value with regards to the protection of civilians,

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[263] Joshua Yuvaraj, 'When Does a Child 'Participate Actively in Hostilities' under the Rome Statute? Protecting Children from Use in Hostilities after Lubanga ' (2016) *(32(83) Utrecht Journal of International and European Law 69)*

[264]Stewart, James G. Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict.(2003) *(International Review of the Red Cross No. 850 (Pp. 313-350) at pp. 316)*

[265]See Dupuy, Rene Jean and Leonetti, Antoine. "La notion de conflict armé à caractère non international." In: (A. *Cassese ed.) The New Humanitarian Law of Armed Conflict.Editorial escientifica. (Naples 1979). (PP. 258-276)*. P. 258:

[266]Warbrick, C. and Rowe, P. The International Criminal Tribunal for Yugoslavia: The decision of the Appeals Chamber on the interlocutory appeal on jurisdiction in the Tadic´ case.(1996) *(International and Comparative Law Quarterly Vol. 45.(Pp. 691-701) at p. 698.)*

which is the subject of this thesis. This is without prejudice to certain important differences with respects to the legal status of persons taking direct part in hostilities.

It may nevertheless be mentioned that, the merging between IAC and NIAC of the IHL rules relating to the conduct of hostilities is somewhat more complex and affects the interplay between IHL and IHRL rules.

Although a situation may amount to a NIAC, the civilian population is frequently covered by the IHRL regime; IHRL obligations on the State towards its citizens are to be respected, save on legally permissible derogation grounds. IHRL provides a higher level of protection than IHL for the persons under the territorial State's control. Whereas, in IAC situations, a belligerent party is primarily bound by IHL rules vis-à-vis the enemy civilians when they are in its hands. The application and interplay of IHL and IHRL rules is then different in these two situations. While the IAC/NIAC dichotomy introduces another level of analysis, the issue will not be subject to particular focus in the course of this study, since its scope does not allow to go into the details of this complex issue. The focus shall rather be on the protection of the child as such, who should not be caught in the complex relationship between the belligerent parties and ought to be protected as such.

5.5 Contribution to Knowledge

Following the objectives the researcher set out to achieve, the following issues are listed as contributions to knowledge.

1. This researcher explored the level of compliance with international legal standards regulating the use of children in armed conflicts.
2. It has examined the culpability of individuals for the use of children in armed conflict.
3. Furthermore, recommendations have been made on how to improve the plight of children involved in armed conflict.

4. Also, having analysed and reviewed papers and books, the researcher found that the papers built on existing research, in the sense that they further explored already existing ideas. By identifying a research gap in this review of previous work, new knowledge was produced, and listed for the benefit of subsequent researchers.

5.6 Conclusion

Child soldiers are complex political individuals who can be considered both victims and perpetrators. If contrary to calls from most children's rights organizations, child soldiers who committed crimes are to be treated primarily as perpetrators one should make sure that a child is indeed legally capable of committing crimes. The main issue when trying to answer the difficult question of child criminal liability is the mensrea requirement. Can a child have the intention to commit an international crime? No minimum age for criminal liability is determined by international law for the reason that no consensus can be reached. This age depends on the conception each state has of childhood and therefore, it widely differs from one country to another. Arguments in favour of the prosecution of child soldiers find support in the theories of punishment, in international human rights law and in domestic practices. Moreover, international criminal law provides some openings towards this option. Arguments given against the prosecution of child soldiers are grounded in the idea that the best interests of the child should be respected. In addition to this, in the event prosecutions occur, children would benefit from defences provided by international criminal law.

The recent history of efforts aimed at protecting children in armed conflict shows that conciliatory discourses and good intentions are not enough. Actions must speak as loud as words. However words, when used, must be compatible with circumstances. Given the context, 'tough talk' is essential. As shown by the experience in Sierra Leone or Sri Lanka (among others), those killing and brutalizing children on battlefields are not innocents themselves. They

re especially savage and rough individuals with whom it is vital to deal with in an unequivocal manner if one is to be listened to and understood. A clear and strong message must be sent to ıctual and potential child victimizers that the world will no longer remain immobilized when aced with gross violation of children's rights in times of armed violence. Strong and meaningful indications have to be sent and followed up with action when necessary that there be no justification of the deliberate brutalization or killing of a child on the battlefield. As repeatedly mentioned by the United Nations Secretary-General, the victimization of children in armed conflict must cease to be considered as something 'merely regrettable'. It is absolutely imperative we ensure that 'it is recognized as intolerable' and 'those who practice this form of child abuse must be held accountable'[267]

According to Lisa Alfredson[268] Children who are separated or displaced from their families or communities are, as particularly vulnerable or marginalized populations, among those at greatest risk of recruitment by armed forces and armed groups. At the same time, the most vulnerable and marginalized segments of society, a category which includes child soldiers, are also most at risk of becoming 'displaced' as refugees, internally displaced persons (IDPs) or asylum seekers. This leaves thousands of children around the world doubly at risk of recruitment and displacement, and sometimes trapped in a vicious circle between the two. Yet the connections between displacement and the use of children as soldiers have remained poorly understood, seriously impeding efforts to address affected children's needs. This is a challenge. Displacement may occur before, during or after a child is recruited, and at any stage of armed

[267]Words spoken by the United Nations Secretary-General to the Security Council on 7 May 2002. See 'Use of Child Combatants Will Carry Consequences', Secretary-General Tells Event on Child Soldiers, United Nations *Press Release SG/SM/8226 of 7 May 2002, available at <http://www.un.org/News/Press/docs/2002/sgsm8226.doc.htm>.accessed 30/10/2019*

[268]Lisa Alfredson works with the Coalition to Stop the Use of Child Soldiers, a consortium of eight international human rights organizations with over 400 member organizations around the world. For more information see the Coalition's website (www.child-soldiers.org) or contact the Coalition via email (info@child-soldiers.org). This paper builds upon an earlier policy paper written for the Coalition and published in Child Soldiers Newsletter (June 2002).

onflict. Recruitment may affect all types of displaced children refugees, asylum seekers, the nternally displaced, and those separated from their families or caregivers. These categories are ar from mutually exclusive; children often become trapped in a cycle of vulnerability to both ecruitment and displacement. Bearing this in mind, we can identify at least four basic connections between child soldiering and displacement.

Holding child soldiers who voluntarily commit international crimes accountable does not mean that these children should be treated just like everyone else. Their childhoods should be taken into account and reflected in their punishment, a punishment that should promote rehabilitation. To prosecute child terrorists as any other war criminal would be a grave failure of the criminal justice system to pursue the goals of retribution and rehabilitation. The consequences of non-prosecution involve more than just a lack of justice. A lack of accountability may encourage militant leaders to use children to carry out the worst offenses rather than committing the acts themselves, as they know the atrocities could be committed with impunity. Accountability for these child soldiers is not an inhumane thirst for revenge; it is a demand for justice and protection for the children and those they harm.[269]

Given the obstacles to enforcement of humanitarian and human rights laws with regard to the use of children in armed conflicts, the establishment of the ICC would help in discouraging individuals from recruiting underage children into the army and hopefully minimize the participation of children in armed conflict. Since most states are already in breach of the age limit on recruitment provided in the Optional Protocol to the Convention on the Rights of the Child and there are no "police" to enforce these international rules, the international community should direct their efforts to the issue of forced recruitment of children. This is more fundamental than the issue of age limit as it cuts across both sides of the divide. Even if the

[269] Cristina Martinez Squiers op citpg 26

states insist on using children in armed conflicts, the children should, at least, not be forced to fight.

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